

STATELESS REFUGEES AND THE RIGHT TO RETURN

THE BIHARI REFUGEES OF SOUTH ASIA

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Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia — Part 1

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Abstract

This article examines the situation of stateless refugees in international law, in the context of the forced population displacement of the Bihari refugees of Pakistan in Bangladesh. The partition of India and the subsequent creation of Pakistan in 1947 led to the displacement of the Biharis, and with the creation of Bangladesh in 1971, the Biharis were forced to flee a second time. However, their international legal status as refugees has seldom been recognized in international law. Part 1 of this article, which is published below, provides the background to the present problem, and shows that the Biharis' claim to Convention refugee status is well-founded, on the basis of a well-founded fear of persecution for reasons of nationality and political opinion, even and despite the succession of Bangladesh from Pakistan and the subsequent denationalization of Biharis by Pakistan which made them *de facto* stateless refugees. Part 2, which will be published in the next issue of the *IJRL* (Volume 12 Number 1), examines the nationality entitlement of the Bihari refugees' and considers their right to return to Pakistan, their country of nationality, as a central factor in any legal solution for them, based on the right to return in international law.

1. Background

After the partition of India in 1947, communal violence preceded by the so-called 'Great Bihar Killing' of 30,000 Muslims in October–November,¹

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¹ Hashmi, Taj, 'The "Bihari" Minorities in Bangladesh: Victims of Nationalisms', mimeo (1996) 4.

Table 1:
Situation Report of Bihari Refugees from India in East Pakistan, 1951

<i>Districts of Bangladesh</i>	<i>Uttar Pradesh</i>	<i>Bihar</i>	<i>Punjab/Delhi</i>	<i>Total</i>
Chittagong	2,626	6,313	331	9,270
Dhaka	6,986	27,530	1,193	32,706
Mymensingh	752	2,624	42	3,418
Dinajpur	2,519	22,914	302	25,735
Bogra	332	4,285	12	4,629
Hessire	571	3,022	50	3,643
Kushtia	644	1,396	6	2,046
Pabna	650	3,078	2	3,730
Rajshahi	620	4,302	29	4,951
Rangpur	3,119	24,885	46	28,050
Total	18,819	97,349	2,002	118,170

Source: Kamaluddin, AFM, *Refugee Problems in Bangladesh*, in Kosinski, Leszek A. and K. Houdood Elahi (ed.), *Population Redistribution and Development in South Asia*, Riedel Publishing Co, Dordrecht (1985) 224

resulted in a large scale movement of Muslims into East Bengal, the newly created province of East Pakistan. Consequently, a million refugees migrated into East Bengal in 1947.² It was estimated that 95.9 per cent of these refugees came from the eastern Indian states of Bihar, West Bengal, Assam, Orissa, Nagaland, Manipur, Tripura and Sikkim.³ Table 1 indicates that the vast majority of the Bihari refugees originated from the Indian state of Bihar.

Although Pakistan was successful in gaining her independence as a theocratic State, she had problems with the national integration of an ethnically plural society. The need for Pakistan to assimilate large numbers of refugees from India created more complexities than solutions, resulting in the 'insider-versus-outsider' syndrome, a phenomenon which exacerbated the problem of lack of acceptance and assimilation of the Bihari refugees in East Pakistan.

The culture of the Bihari refugees contributed to the definition of the ethnic boundary between them and the majority Bengali residents. In addition, when the West Pakistani feudal elite began to capture economic and political power in East Pakistan, the Biharis who shared the same language with the elite, began a covert identification with them. Their ethnicity gave them access to preferential treatment in various sectors of

² Minority Rights Group, *The Biharis in Bangladesh*, Report 11, 4th ed., (Jan. 1982), 7.

³ Chowdhury, E. Haque, 'Non-Bengali Refugees in Bangladesh: Patterns, Policies and Consequences', in Rogge, John (ed.), *Refugees: A Third World Dilemma*, Rowman & Littlefield, New Jersey, (1987), 220.

the East Pakistani economy and a relatively privileged position in terms of official patronage.⁴ In fact, Biharis acquired the nationality of Pakistan as a precondition to resettlement with priority given to the *Muhajirs*⁵ by public policy measures, especially ‘... in the railways, post and telegraph, armed forces, private industries, trade and commerce’.⁶ Table 2, an official document of the Government of Pakistan, testifies to the support for Biharis in the public sector, where they were given a relatively better average percentage in major occupational categories⁷ than the Bengali majority.

Table 2:
Population Distribution by Ethnicity in Industry/Occupation, 1951

<i>Sector</i>	<i>Bengalis</i>	<i>%</i>	<i>Biharis</i>	<i>%</i>
Agriculture,	10,811,301	85.24	104,430	51.63
Forestry, Fishery				
Mining	2,522	0.02	55	0.03
Manufacturing	481,277	3.79	17,411	8.61
Construction,	136,634	1.08	7,689	3.80
Electricity, Gas,				
Water				
Commerce	477,510	3.76	25,044	12.38
Government	168,340	1.33	10,775	5.33
Services				
Personal and	420,020	3.34	16,682	8.25
Community				
Services				
Total	12,683,744	100.00	202,256	100.00

Source: *Census of Pakistan*, Ministry of Home and Kashmir Affairs, Government of Pakistan (1951)⁸

⁴ Although it has argued that the Urdu-speaking educated, well-to-do and businessman preferred West Pakistan to East Pakistan as they envisaged the existing socio-economic-political conditions congenial for their future prospects. See Begum, Khurshida, ‘The Stranded Pakistanis in Bangladesh and International Implications’, paper, *International Workshop on Internationalization of Ethnic Conflict*, International Centre for Ethnic Studies, Kandy, Sri Lanka, 2–4 Aug. 1989, 9.

⁵ The term *Muhajir* literally translates to mean a refugee. In this case, the *Muhajir* is the Bihari refugee.

⁶ Chowdhury, ‘Non-Bengali Refugees in Bangladesh’, above n. 3, 223.

⁷ It has been argued that the government provided the Biharis bank credit facilities for industrial and commercial investments and nominal interest rates, licences for national and international trade, large scale estate housing and the establishment of Urdu-medium schools. Over a period, ‘[a]ll these had their impact (on the social and economic fabric of East Pakistan, resulting in alienation and) on the disintegration process’, leading to the independence of Bangladesh. ‘The government deliberately followed a policy to keep the Biharis isolated from the Bengalis’. See Begum, Khurshida, ‘The Stranded Pakistanis’, above n.4, 10–12.

⁸ See Chowdhury, ‘Non-Bengali Refugees in Bangladesh’, above n. 3, 224.

The arrival of the Biharis and the Pakistani governmental efforts at refugee rehabilitation was at first not resented by the local Bengali population. The general euphoria surrounding the creation of Pakistan resulted in positive discrimination towards the Bihari refugees. In fact, the Pakistani ruling elite portrayed the Bihari as *mujahir* with a view to making the Bengali of East Pakistan 'duty-bound to help and accept them as their own people'.⁹ Between 1947–51, a large number of Hindu landlords, businessmen, professionals and petty officials emigrated to India, and the Bengali Muslims and Biharis grabbed Hindu properties and acquired their positions at work. At this stage, the Bengali Muslims did not think of the Urdu-speaking Biharis as minorities.¹⁰

Hashmi concludes that 'the honeymoon was quite short' when, as early as March 1948, Jinnah announced in Dhaka that 'Urdu and Urdu alone shall be the State language of Pakistan' and anyone who opposed Urdu as the State language was an enemy of Pakistan.¹¹ The gradual drifting apart of East and West Pakistan between 1952 and 1971 can be summed up as a result of the '... collective megalomania of Pakistani elites, motivated by a colonial attitude' of plunder and subjugation of East Pakistan with the concentrated victimization of the Bengali and the Biharis of the lower echelons of society.¹² Despite their class and cultural differences, Biharis in East Pakistan accepted the West Pakistani ruling elite as their 'sole patrons, guides and protectors'.¹³ In contradistinction, the Pakistani elite often regarded the Bengali Muslims as 'semi Hindus, pro-Indian and disloyal to Pakistan'.¹⁴ This dysfunctional feeling amongst the West Pakistani political bureaucracy became all the more evident in the second half of the 1960s, when Pakistan began to loosen its hold on the political fabric of East Pakistan. By the late 1960s, while some Biharis

⁹ Hashmi, Taj, 'The "Bihari" Minorities in Bangladesh', above n. 1, 6.

¹⁰ Ibid., 5. In fact, Mujibur Rahman, later the first Prime Minister of Bangladesh, is said to have urged Bihari Muslim refugees to emigrate to East Pakistan. See Chatterjee, Basant, *Inside Bangladesh Today: An Eyewitness Account*, New Delhi (1973), 85.

¹¹ The history of disintegration of Pakistan in 1971 and the massive refugee flows from East Pakistan into India are extensively discussed in Callard, Keith, *Pakistan: A Political Study*, London (1957).

¹² Hashmi argues that the upper echelons of the Biharis in East Pakistan, as junior partners of West Pakistani business groups, believed that their existence and continued prosperity depended on the goodwill of the Pakistani ruling elite. 'Consequently they also joined the anti-East Pakistani and pro-West Pakistani stream, mobilising the half-educated or illiterate, poorer, working class sections of the Biharis against the Bengali neighbours, thus forsaking the economic and political interests of their adopted home, East Pakistan. On several occasions, Bihari mill-workers at Narayanganj, Dhaka, Khulna and Chittagong took part in anti-Bengali communal riots, whipped up their Pakistani masters in the 1950s and 1960s'. Hashmi, above n. 1, 7.

¹³ Ibid., 8.

¹⁴ Ahmed, Kamruddin, *The Social History of East Pakistan*, University Press, Dhaka (1967), 124.

openly sided with the quasi-military regime of Pakistan,¹⁵ Bengali Muslims demanded independence for their province.

As a result, Pakistan disintegrated in 1971 with two simultaneous major refugee movements. The first was the escape of the estimated 10 million refugees into India in the aftermath of the brutal massacre of the Bengali population, while the second flight consisted of the minority Biharis into refugee camps within East Pakistan as a result of their persecution by the Bengalis during the liberation fervour.¹⁶

2. Assessment of Refugee Status

The existence of persecution in the country of origin forms the bases for the application of international refugee law for the determination of refugee status. The claim to Convention refugees status of the Bihari will be assessed on the basis of the definition contained in the Convention Relating to the Status of Refugees and the 1967 Protocol (CSR51).¹⁷

2.1 Analysis and application of the definition

The definition of the term refugee under the 1951 Convention/1967 Protocol applies to any person who,

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

While the Convention illustrates the reasons for fear of persecution, the element of well-foundedness of fear in the determination of refugee status looks towards the future, rather than the past.¹⁸ Evidence of tangible harm done to a potential refugee claimant strengthens the case, tending to prove a well-founded fear and thereby endorsing the need for protection from further persecution. However, in the construction of the claim to

¹⁵ While interestingly, most of the *Muhajirs* in West Pakistan openly defied Ayub Khan and demanded more rights and opportunities. 'This indicates that, unlike the Biharis in East Pakistan, refugees from India in Karachi had leaders from within their community who did not want to compromise with the central government at the expense of their adopted home, Karachi'. See Hashmi, above n. 1, 9.

¹⁶ The first movement of 10 million refugees, when the Bengali refugees fled to India, returned in the early 1970s and have been successfully resettled. The second constitutes the Bihari refugees who fled their homes in East Pakistan because of persecution by the majority Bengali population, are presently in Bangladesh, and are still awaiting a resolution to their inordinately long crisis.

¹⁷ Since South Asia lacks domestic refugee legislation, the 1951/67 definition is used as the basic international definition.

¹⁸ Goodwin-Gill, G.S., *The Refugee in International Law*, Oxford: Clarendon Press, 2nd ed., 1996, 40.

refugee status of Biharis, evidence of 28 years needs assessment and will involve objective and subjective factors of fear, both perceived and actual persecution suffered by Biharis.

2.1.1 *Well-founded fear and persecution in East Pakistan*

In the formal determination of refugee status, assessment of a well-founded fear of persecution is usually based on the application of a fairly high level standard of proof of objective facts. In the case of the Biharis, care is required in reconstructing the bases for their claims of fear of persecution.

The parliamentary elections in December 1970¹⁹ stirred up Bengali nationalism, which translated itself throughout East Pakistan as attacks on Bihari establishments, since it was widely perceived that most Biharis supported the pro-Pakistan Muslim League. Bengali mobs carried out a reign of terror in both Dhaka and Chittagong, as well as in the peripheral districts beyond the control of the Pakistan Army, until Pakistani control was re-established in March–April 1971. For a period of three months, between December and March, the Biharis of East Pakistan were subject to systematic persecution.

Thousands of Biharis were brutally killed as a result of ethnic cleansing on the part of Bengalis. In many parts, Biharis were burnt alive or hacked to death by Bengali marauders.²⁰ When Yahya Khan postponed the promised National Assembly, Bengalis turned on Biharis as they were viewed as synonymous with and symbols of Pakistani domination. Over 300 Biharis were killed by mobs at Chittagong in early March 1971, with subsequent slaughters at Jessore, Khulna, Rangpur and Saidpur. A further slaughter in Mymensingh caused a mass movement of Biharis into the Mirpur suburb of Dhaka, still within Pakistani control.²¹

The massacre of Biharis was described by Mascarenhas:

Thousands of families of unfortunate Muslims, many of them refugees from Bihar, . . . were mercilessly wiped out. Women were raped or had their breasts torn out with specially fashioned knives. Children did not escape the horror: the lucky ones were killed with their parents; but many thousands of others must go through what life remains for them with their eyes gouged out and limbs roughly amputated. More than 20,000 bodies of the non-Bengalis have been found in the main towns as Chittagong, Khulna and Jessore. The real toll, I was told

¹⁹ The results of the parliamentary elections fuelled the dissatisfaction of the Bengali mass, when on 1 Mar. 1971, President Yahya Khan prorogued the impending parliamentary session, with the excuse of formulating an understanding between the Awami League (East Pakistan-based, majority party in Parliament) and the Pakistan People's Party (West Pakistan-based, with the second largest majority), in order to reach a consensus on the future constitution of Pakistan. See Hashmi, above n. 1, 11.

²⁰ Aziz, Qutbuddin, *Blood and Tears*, Karachi (1974).

²¹ Minority Rights Group, *The Biharis in Bangladesh*, London (1982) 8–9.

everywhere in East Bengal, may have been as high as 100,000; for thousands of non-Bengalis have vanished without a trace.²²

The persecution of the Biharis was reported widely in the contemporary press. Reports from the time indicated that when Chittagong was still governed by the Awami League and its allies, Bengali workers, resentful of the relative prosperity of the Biharis, killed them in large numbers, while in Khulna, by May 1971, thousands of Biharis were 'tied to frames specially set up to hold prisoners for decapitation'.²³ It was further reported that hundreds of Biharis died in the north-western town of Dinajpur.²⁴ Other media reports substantiated the claim that Biharis were killed by Bengalis in different parts of East Pakistan.²⁵

A government document estimated the death toll of Biharis to be 15,000,²⁶ although eyewitness accounts put the figure at 50,000. Other eyewitnesses reported that violent mobs, led by armed Awami League stormtroopers, 'invaded' Bihari settlements in Raufabad, Halishahar, Dotala, Kalurghat, Hamzabad and Pahartali. The East Bengal Regimental Centre²⁷ served as the 'principal human abattoir'.²⁸

Commenting on Pakistani politics, Ziring stated that Mujibur Rahman's call to strike on 1 March 1971 'was also taken as [a] call to arms and a bloody campaign of murder, arson and looting ... [where the] Bihari community was the target ... and many of them were butchered in wild orgies that [Rahman and his party] seemed unable or unwilling to prevent ... The massacre of the non-Bengalis also continued unabated, causing the initial flight to India of tens of thousands'.²⁹

The discrimination of the State against the Bihari minority is further evidenced in the attitude of Bengali military officers. Major Zia-ur-Rahman³⁰ is stated to have remarked in 1971, that '[t]hose who speak

²² Mascarenhas, Anthony, *The Rape of Bangladesh*, Delhi (1971). These figures are corroborated by another report, which stated 'the brutal massacre of thousands of non-Bengalis ... (where) 20,000 bodies have been found ... in Bengal's main towns but the final count could top 100,000': *The Sunday Times*, London, 2 May 1971.

²³ Browne, Malcolm, *New York Times*, 10 May 1971.

²⁴ *The Times*, London, 6 Apr. 1971. A memorandum by Diwan Wirasat Hussain of the East Pakistan Refugee Association delivered to the British Parliamentary Delegation on 20 Jun. 1971 estimated that out of 50,000 Muslim refugees, that is, Biharis, barely 150 survived in Mar.-Apr. 1971, before the arrival of the Pakistani troops. See Aziz, Qutbuddin, above n. 20, 121.

²⁵ Aziz, Qutbuddin, above n. 20, 183, where it was stated, 'I am an eyewitness of how Bihari businessmen and their family members were gunned down and how 700 Biharis were kept in jail and later killed by Bengalis at Sirajganj town in April 1971, prior to the arrival of the Pakistani army'.

²⁶ *East Pakistan Crisis*, White Paper, Government of Pakistan, Aug. 1971.

²⁷ Operational headquarters of the Bengali troops.

²⁸ Aziz, Qutbuddin, above n. 20, 48.

²⁹ Ziring, Lawrence, *Bangladesh from Mujib to Ershad: an Interpretive Study*, University Press, Dhaka (1992) 64-5.

³⁰ A military officer, later Lieutenant-General and President of Bangladesh till 1981.

Urdu (Biharis) are also our enemies because they support the Pakistani army. We will crush them'.³¹

2.1.2 *Political opinion*

Bihari political opinion has its basis in their cultural origin. As a result of a shared linguistic heritage, Biharis tended to associate themselves with West Pakistan. Besides, when the Urdu-speaking West Pakistani captured economic and political power in East Pakistan, the Biharis shared their political gain, as evidenced by Table 2. The governmental policy of favouritism and insulation of the Bihari community from the Bengali majority led the Bihari to cast their fate with the West Pakistani political elite. The majority of them had voted for the Muslim League and Jamati-Islami in the elections.³² At the same time, when the Awami League began to grow as an influential political party, they found their counterparts in West Pakistan a hindrance to their prosperity. Their resulting exclusive and limited policies failed to recognize and profit from Bihari class consciousness.³³

The Bengali political elite in East Pakistan used the Urdu-only language issue to denounce the suppressive attitude of the authorities in West Pakistan. While this stance inspired the majority in East Pakistan, it aggravated the alienation of the Biharis, making them lean towards the West Pakistanis. The Bengalis, initially sympathetic towards the oppressed Biharis, gradually became suspicious of their exclusive attitudes and political activities.³⁴

It is understood that political opinion, within the substantive framework of limitations posed by human rights, is any opinion on any matter in which the machinery of State, government or policy may be engaged.³⁵ The political opinion of the Bihari community resulted in systematic persecution by the majority-led government and its entities. The political agenda of the Bihari community exposed them to the reality of persecution. It has been argued that although political opinions may or may not be expressed, they may be interpreted as attributive features for the determination of refugee status. This is true for the Biharis who may not have overtly expressed their political will but nonetheless suffered repressive measures and systematic persecution. Their fear of persecution

³¹ The systematic massacre of the Biharis was complete when in 28 March 1971 Zia-ur-Rahman ordered his troops to shoot the male Biharis prisoners in Chittagong, and allowed his troops to outrage the modesty of the female prisoners. See Mascarhenas, Anthony, *Bangladesh: A Legacy of Blood*, London (1986) 118–9, 122.

³² Begum, Khurshida, above n. 4, 13.

³³ Umar, Badruddin, *Juddhattar Bangladesh (Bangladesh after the War)*, Muktohdhara, Dhaka (1982) 26.

³⁴ Begum, Khurshida, above n. 4, 17.

³⁵ *Canada v. Ward*, 2 SCR 689 (1993).

is therefore well-founded and can be clearly evidenced.³⁶ Moreover, the subjective aspect of political opinion of the Bihari community does not essentially follow from the objective political actions of anyone or some of them. Therefore, the general political opinion of the majority stems more from covert rather than overt expressions of opinion through political action. The continuous deprivation of *de jure* nationality by Pakistan needs to be assessed as central to the persecution of Biharis and the basis for their political opinions and beliefs.

2.1.3 Persecution in Bangladesh

The persecution which had commenced in the country of origin, carried on in Bangladesh. This section will illustrate the continuation of fear and persecution, in order to implicate the country of origin because of its failure to provide protection to its nationals.

In exploring the cause–effect factor, Goodwin-Gill suggests that ‘Cause and effect are yet more indirect where the government of the country of origin cannot be immediately implicated’ and he cites the example of refugees who ‘fled mob violence or the activities of so-called death squads’.³⁷ Following Goodwin-Gill’s logic, the Biharis may be viewed as refugees escaping organized violence. What needs to be proved is that the provincial government in East Pakistan was directly implicated and responsible for organizing and orchestrating the persecution, eventually leading to the flight of the Biharis and hence their claim to refugee status. Even after the independence of Bangladesh, the new government of Mujibur Rahman failed to stop the violence against the minority community of Biharis.

Although only a few Biharis had joined the East Pakistan Civil Armed Forces (EPCAF), forces raised by the Pakistani authorities as *Razakars* and *Al-Shams*, the mass murder of the Bihari refugees by Bengali nationalists continued unabated. Biharis were ‘taken blind-folded in broad daylight to be executed by locally organised firing squads, on flimsy charges of collaboration with the Pakistanis and [the] killing of Bengalis during the Liberation War’.³⁸ Several thousand Biharis were arrested as alleged collaborators, taken to prison and disappeared. The largely chauvinistic press of the period fuelled a genocide that was perpetrated on a large number of Biharis families who had not committed any political crime. Government speeches castigating troublemakers and lawless elements were soon interpreted by extremist nationalists to suggest that all the Biharis were collectively guilty. In fact, the complicity of the authorities in the gruesome extermination of Biharis refugees in Bangladesh is amply

³⁶ See Goodwin-Gill, *Refugee*, 49.

³⁷ *Ibid.*, 71–2.

³⁸ Hashmi, above n. 1, 19.

evidenced by the actions of a guerrilla leader ³⁹ who killed several Biharis in a Dhaka stadium, 'an act which was seen widely on television and in the world's press, but for which he has never been tried'.⁴⁰

As long as the Indian Army remained in Bangladesh, they protected the Biharis in the refugee camps.⁴¹ But with the departure of the Indian Army with most of the West Pakistani civilian and Prisoners-of-War, the persecution of the Biharis turned into a generalized massacre. Instead of being a safe haven, these camps became the target of attack. Intermittently, water and power were cut, but the Biharis refugees were terrified to move in search of food or work. Visits to some refugee camps in 1973 led to the following observation:

Perhaps no other class of people in the world today (are) as ruined, economically and socially, as smitten and smashed up as the community of the former Indian refugees in Bangladesh who are known here by the general term Bihari ... Today in Bangladesh, to be a Bihari is the worst crime ... Thousands have been discharged from service on the ground of 'long absence without leave'. But their salaries and funds have not yet been paid ... Many persons rejoined duty on the strength of 'clearance chits' given by Awami League MPs. But they did not return; even their bodies remained untraced.⁴²

While the killings continued with government connivance or local initiative, many of the Biharis houses were occupied by Awami League sympathizers. In order to legitimize their illegal occupation, properties were decorated with League banners, and the majority of Biharis were forced to sign documents to facilitate the transfer of ownership of houses, shops and factories.⁴³

The absence of State security in all Bihari camps resulted in assaults, looting, rapes, evictions, kidnappings and killings. Most of the attacks were perpetrated by members of the *Mukti Bahini* aimed at providing extra-judicial justice. Bearing the label of a 'collaborator' was heavy for the Biharis, because it meant imprisonment without proof of their having collaborated with the Pakistan authorities in the killings of Bengalis. It meant systematic harassment at the hands of the police, often leading to widespread torture.⁴⁴ It needs to be recalled that Mujibur Rahman had pledged the safety and security of the Biharis as his personal responsibility.⁴⁵ Even though food rations were reported inadequate,⁴⁶ and further reports

³⁹ 'Tiger' Kader Siddiqui was granted general amnesty for his political crimes by Mujibur Rahman.

⁴⁰ Minority Rights Group, above n. 21, 9.

⁴¹ Report, Friends of Bangladesh Conciliation Mission, London (27 April–23 May 1972) 7.

⁴² Chatterjee, Basant, above n. 10, 102–13.

⁴³ See Report, Friends of Bangladesh Conciliation Mission, above n. 41, 11. This has been further corroborated in the interviews conducted in the Bihari camps.

⁴⁴ Ibid., 8–12.

⁴⁵ *The Times*, 11 May 1972.

⁴⁶ *The Times*, 2 May 1972.

Table 3:
Situation Report of Bihari Refugee Camps in Bangladesh, 1972

<i>Districts of Bangladesh</i>	<i>Number of Biharis</i>
Dhaka — Outskirts	278,500
Dhaka — Mirpur	150,000
Dhaka — Mohammadpur	95,000
Dhaka — Adamjee	16,000
Dhaka — Isphani	3,000
Dhaka — Murapara	9,500
Saidpur	275,000
Rangpur	7,000
Chittagong	60,000
Khulna	60,000
Ishurdi	30,000
Bogra	14,000
Rajshahi	4,500
Mymensingh	3,100
Comilla	1,200
Sylhet	1,000
Jessore	700
Dinajpur	180
Total	1,008,680

Source: Compiled from statistics provided in MRG, *The Biharis in Bangladesh*, Report 11, 4th ed., London (1982)

of the government preventing ICRC access to Bihari camps,⁴⁷ the fear of renewed persecution forced Biharis to leave their homes, which were taken over by Bengalis at the point of a gun.⁴⁸ This organized persecution resulted in a near total loss of the property of the Bihari refugees, and by the middle of 1972 they were completely domiciled in various camps.⁴⁹ See Table 3.

2.1.4 Acquisition of property for reasons of race, nationality and membership of a particular social group

The orchestrated persecution against the Biharis continued because of reasons of race, nationality and membership of a particular social group. Persecution of the Biharis continued because of their ethnic origin and

⁴⁷ *The Daily Telegraph*, 14 Mar. 1972.

⁴⁸ *The Observer*, 16 Apr. 1972.

⁴⁹ Ben Whitaker wrote, the '... psychological despair (is) developing in the Bihari ghettos (read refugee camps) ... the Biharis do not have the courage to venture outside (the camps), even to contact the authorities'. See *The Observer*, 14 May 1972.

their insistence on retaining their Pakistani nationality, thus constituting persecution for reasons of race and nationality. However, the persecution of the Biharis was aggravated due to their membership of a particular social group.

While the *travaux préparatoires* of the 1951 Convention do little to explain social group as a category, paragraph 78 of the UNHCR *Handbook* provides the following:

Membership of a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook . . . is . . . an obstacle to the Government's policies.

Continued persecution led to the abandonment of Bihari properties. In order to escape, Biharis were coerced into the refugee camps or left Bangladesh altogether. As a result of shared values, background, ethnic and linguistic origins and 'political outlook', the Biharis were targeted by government forces and their properties confiscated. In order to make arrangements for the administration and management of such properties, Bangladesh promulgated the Acting President's Order I of 1972, followed by the Bangladesh Abandoned Property (Control, Management and Disposal) Order 1972.⁵⁰ The order provided for the acquisition and control of properties of certain persons who were either (a) not present in Bangladesh, or (b) who [had] ceased to occupy or manage their properties, or (c) who [were] *alien enemies*. It was concluded that such property would include any property owned by any person who [was] a citizen of a State which was at war with or engaged in military operations against Bangladesh.⁵¹ Since Biharis were citizens of Pakistan, the law allowed for the acquisition by the State of their properties.

According to the above order, Pakistani nationals could not recover or release their properties, since the law provided no statutory provisions in this regard. In addition, the term 'alien friends' was employed to counter the provision that did not allow Pakistanis to recover properties by filing suits under section 83 of the Civil Procedure Code, while in fact there was no bar on 'alien friends' filing suit under section 83. The procedural law disguised and took away provisions by employing confusing terminology. In reality, however, 'alien friends' were technically treated as 'alien enemies', in spite of provisions in law which entitled resident non-citizens to enjoy the protection of the law and be treated in accordance with the law.

Armed with the legal right to administer, manage and dispose of the 'abandoned' properties, the Presidential Order was an executive decree ostensibly to protect the properties to be acquired illegally. However, the

⁵⁰ Also referred to as Presidential Order 16 of 1972.

⁵¹ *Ibid.*, s. 2(1)(i).

Acting President's Order I allowed the government to take over industrial and commercial concerns whose owners, directors and managers 'were not available',⁵² further empowering governmental officials 'to operate bank accounts of the owners, directors and managers'.⁵³

This first step in the acquisition of properties of Bihari refugees was further cemented by the President's Order 16. The vaguely defined 'abandoned' property referred to in the Order was sought to be disposed through government appointed administrators,⁵⁴ in the persons of Deputy Commissioners and Sub-Divisional Magistrates.⁵⁵ In respect of the said Order, many bona fide citizens of the country living within Bangladesh were classified 'alien enemies', and their properties were expropriated. In defending the rights of some citizens, Ahmed stated that the Presidential Order 16 gave 'the government extraordinary powers with regard to properties not only of Pakistanis (including the majority Biharis) but also of its own citizens'.⁵⁶ Also, section 15(2) of the Order provided that a person might revoke the categorization of the property as abandoned, within three months of the date of the commencement of the Order. Ahmed dismissed the applicability of this provision on the ground that the right of *citizens* to complain was taken away as the Rules came much later than three months after the date of commencement. However, while citizens were having to make their cases against unfair and putatively illegal statutory provisions, Bihari refugees in the camps could seek no legal recourse whatsoever.⁵⁷

The principle of vested or acquired rights supports the principle that a change of sovereignty should not affect the private rights of individuals. The acquired rights principle was qualified by O'Connell, who stated that 'the principle of respect for acquired rights in international law is no more than a principle and change of sovereignty should not touch

⁵² See s. 2(1), Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972, also referred as Acting President's Order I, 1972, in Rakshit, M.K., *The Law of Abandoned Properties in Bangladesh*, SR Rakshit Publisher, Chittagong (1994) 18–19.

⁵³ *Ibid.*, s. 2(2).

⁵⁴ Hashmi, above n. 1, 22.

⁵⁵ The first reference to these officials is stated in s. 7(1) of the Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972. See Rakshit, above n. 52, 25–6.

⁵⁶ Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Dhaka (1991) 16–19. See text of the Order in Rakshit, above n. 52, 23–44.

⁵⁷ As an example, the case of Mr Murad Ali Qureshi deems attention. Qureshi was employed by the Central India Customs and Excise Department in Calcutta. In 1947 he opted for Pakistan and was transferred to East Pakistan. In 1971, while he was the Assistant Director, Customs Intelligence and Investigation, his house in Chittagong was declared abandoned and allotted to a Bengali. The assets were forcibly removed and he was forced to go on unpaid leave. His failure at judicial recourse in Bangladesh led him successfully to seek repatriation to Pakistan. Correspondence of (a) Abdul Hamid Ghazi, First Secretary, National Affairs, Overseas Pakistanis and Prisons Division, Government of Pakistan, FS/OP/7503, 25 Feb. 1975, (b) ICRC Delegation in Pakistan, 10 Mar. 1975, (c) Anne Marie Testut, ICRC Delegate, Bangladesh, Case No.B/14661, 2 Apr. 1975.

the interests of individuals more than is necessary'. He further stated that the alteration and cancellation of acquired rights by successor States must comply with the minimum standards of international law.⁵⁸ It is now amply evident that the Bangladeshi confiscation and illegal acquisition of the properties of Biharis has fallen well short of accepted international legal norms and procedures.

As an interim measure, Bangladesh adopted the Presidential Order 149 in 1972 which allowed for the temporary provision of citizenship.⁵⁹ This Order was part of Bangladesh's adoption of the so called 'zero option' solution,⁶⁰ whereby Rahman offered the Biharis Bangladeshi citizenship. Refusing to submit to the new sovereign through the acquisition of a new nationality, the Bihari community declined. This was the backdrop to the large scale persecution of the Bihari community by loyalists of the Mukti Bahini, as a result of the post-independent 'Bengalisation' of Bangladesh by Rahman.⁶¹

According to section 2 of the Bangladesh Abandoned Property (Control, Management and Disposal) Order, 1972 which required the surrender of any abandoned property in possession of any person, the Biharis had to surrender their properties, since they were technically citizens of Pakistan, and according to the definition of abandoned properties were still 'citizen(s) of a State after the 25th day of March, 1971 ... at war ... against Bangladesh'.⁶² Even the properties of the Biharis who had *not* opted for repatriation to Pakistan were taken over by the advantaged political elite. Leaders of the ruling party⁶³ and officers under patronage took full advantage of the government order to deprive the Biharis of

⁵⁸ See O'Connell, D.P., *International Law*, 2nd ed., 1970, 377–81, 388–9; *State Succession*, 2nd ed., chs. 6, 10.

⁵⁹ The citizenship laws were in force as under the Bangladesh Citizenship (Temporary Provisions) Rules in 1978. See Rakshit, above n. 52, 140.

⁶⁰ The 'zero option' solution was adopted, in general, by States that consist of a majority of their own ethno-national group, under which citizenship is granted to all people living in the republic either at the time of independence or at the moment the new nationality or citizenship law was passed. This conception has been discussed, among others, in Henckaerts, Jean-Marie, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers, The Hague/Boston/London (1995) 92.

⁶¹ See *The Economist*, 13 May 1972. Further, it was argued by Sunanda Datta-Ray, '[a]ssimilation (of Biharis) with the aggressively Bengali culture of Bangladesh — Bengali has been declared the language for schools, courts and Government offices — is out of question. Even Indians from West Bengal wince at the militancy of Bengali chauvinism in the East (ie Bangladesh)'. See *The Observer*, 12 Mar. 1972.

⁶² S. 2(1)(i), The Bangladesh (Taking Over of Control and Management of Industrial and Commercial Concerns) Order, 1972.

⁶³ Prominent were Korban Ali, Shah Moazzem and nephew of Mujibur Rahman, Sheikh Fazlul Haq Moni. See Chatterjee, above n. 10, 102–13.

their properties, and 'the result was chaos, corruption, [looting] and plunder',⁶⁴ although Bangladeshi official sources tried to dismiss it.⁶⁵

2.2 Denationalization of Biharis by Pakistan

Pakistan helped perpetrate the persecution of the Biharis under Bangladeshi rule by the denial of their effective nationality. In this context, the presumptions and policy rules against the arbitrary deprivation of nationality merit attention. It is fairly well established in customary international law that no one shall be arbitrarily deprived of their nationality, and if necessary, the deprivation must be prescribed by law.

Wilful deprivation of nationality, in particular mass denationalization, is inconsistent with the international obligations of States. Equally, denationalization for penal or political reasons is inconsistent with the notion of the human being as a person in law.⁶⁶ Weis declared 'deprivation of nationality, leading to denationalization, to be illegal . . . (and) [i]f the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal'.⁶⁷ Further, deprivation on the grounds of a policy of racial inequality or persecution is contrary to international law and elementary principles of human justice. The act of denationalization may not *per se* have delictual consequences but it is probable that it would be in breach of the provisions of the 1966 International Covenant on Civil and Political Rights.⁶⁸ Further, the deprivation is not entitled to recognition by other international actors, because it disregards the doctrine of effective link, and represents an attempt to avoid the responsibilities of territorial sovereignty and statehood.

The standards of non-arbitrariness in the deprivation of nationality provide for the following: (1) deprivation of nationality prescribed by law after full legal proceedings involving review and appeal; (2) deprivation not leading to statelessness; (3) deprivation acceptable if nationality secured by fraud; or (4) deprivation as a result of the national engaging in acts posing serious threats to national security.

Within international legal norms, post-1971 Pakistan legislated categories of Biharis who would qualify for repatriation. The majority of the Biharis were excluded due to the restrictive acceptance for return

⁶⁴ Ahmed, Moudud, *Bangladesh: Era of Sheikh Mujibur Rahman*, Dhaka (1991) 14–16.

⁶⁵ The Bangladesh High Commissioner to the United Kingdom stated, '... I have on the authority of my Government to say that no such killing has taken place anywhere in Bangladesh'. See Letter to the Editor by Syed Abdus Sultan, *The Times*, London, 12 May 1972.

⁶⁶ Weis, P., *Nationality and Statelessness in International Law*, 2nd ed., 1979, 127.

⁶⁷ *Ibid.*, 127–31. However, if the deprivation is not a part of a delictual act but merely involves denationalization of groups of citizens domiciled within the frontiers of a State, who lack any other links, then there is no delict.

⁶⁸ Cf. Brownlie, I., 'The Relations of Nationality in Public International Law', 39 *BYIL* 284, 337 (1963); art. 1(2), CSR51; art. 9, 1961 Convention on the Reduction of Statelessness.

criteria set by Pakistan. When Bangladesh emerged as an independent nation in December 1971, it was host to more than a million Bihari refugees.⁶⁹ Although government reports indicate that 600,000 Biharis accepted Bangladesh citizenship, there were 539,669 who registered with the ICRC in order to return to their country of nationality.⁷⁰ While the ICRC estimated that 60 per cent wished to go to Pakistan, Biharis themselves stated that 95 per cent wanted to go to Pakistan and 5 per cent to India.⁷¹ Since the majority had suffered widespread persecution or still perceived considerable threat, they had all chosen to leave Bangladesh for Pakistan.⁷²

The first political step in formulating categories of 'non-Bengalis' to be accepted in Pakistan began with the recognition of Bangladesh as an independent State. This was primarily because President Bhutto of Pakistan needed to negotiate the return of 93,000 POWs held captive in Bangladesh. However, he was equally anxious to see that the one million Biharis did not move to Pakistan.⁷³ Although Bhutto spoke against the proposed Bangladeshi war crimes trial of Pakistanis,⁷⁴ he was unwilling to admit any sizeable number of Bihari refugees into Pakistan.⁷⁵ Further, he was agreeable to admit some Biharis, but ruled out mass return to Pakistan.⁷⁶

Pakistan agreed by the New Delhi Agreement of 28 August 1973 to transfer a substantial number of 'non-Bengalis' in Bangladesh who had opted for repatriation to Pakistan, in exchange for Bengalis in Pakistan and the return of POWs.⁷⁷ Using the ICRC as the route for all applications for repatriation from Biharis to the Government of Pakistan,⁷⁸ the ICRC made it clear at the time that '[r]egistration with the ICRC does not give a right to repatriation. The final acceptance . . . lies with (the) Pakistan and Bangladesh governments'.⁷⁹ Pakistan began issuing clearances in

⁶⁹ See above, Table 3.

⁷⁰ *Stranded Pakistanis in Bangladesh*, Ministry of Relief and Rehabilitation, Government of the People's Republic of Bangladesh (1982) 3. However, interviews with a wide cross-section of the Bihari refugees prove that the governmental figures in relation to acceptance of Bangladeshi citizenship were grossly exaggerated.

⁷¹ Minority Rights Group, above n. 21, 13.

⁷² The persistent demand to repatriate to Pakistan made in 1972 is still held by Bihari refugees. This is corroborated by interviews conducted in 1996–97.

⁷³ *The Daily Telegraph*, 18 Feb. 1972; *The Times*, 18 May 1972.

⁷⁴ *The Observer*, 14 May 1972. However, Bangladesh did not proceed with the trials as an act of clemency. See *Bangladesh-Pakistan-India Agreement on the Repatriation of POWs and Civilian Internees*, 13 *ILM* (1974) 501, para. 15.

⁷⁵ *The Economist*, 13 May 1972.

⁷⁶ *The Guardian*, 11 May 1972.

⁷⁷ 'Bangladesh-Pakistan-India Agreement on the Repatriation of POWs and Civilian Internees', 13 *ILM* (1974) 501.

⁷⁸ See Office Memorandum by M. Aslam Tariq, No.31/78-Rep-I, Cabinet Division, Government of Pakistan, Rawalpindi, 26 Aug. 1978.

⁷⁹ As quoted from the application receipt retained by Mr Shakoor, Ref No MD-10461, Geneva Camp, Mohammedpur, Dhaka.

favour of those 'non-Bengalis' who were either (i) domiciled in former West Pakistan, (ii) were employees of the Central Government and their families or (iii) were members of divided families, irrespective of their original domicile. Pakistan reiterated that all those who fell under the first three categories would be received by Pakistan without any limit as to members.⁸⁰ In respect of persons whose applications had been rejected, Pakistan agreed, upon request, to provide reasons why any particular case was rejected. Any aggrieved applicant could, at any time, seek a review of his application provided he was able to supply new facts to support his contention that he qualified in one of the three categories. The claims of such persons would not be time bound. In the event of a review, it was decided that Pakistan and Bangladesh would resolve it by mutual consultation.⁸¹

However, in practice, denationalization through non-adherence to the established categories was effected since the majority remain. The review of rejected applicants in the light of the reinterpretation of the definitions of 'central government employees and divided families' merit fresh legal assessment.

First, all railway employees should have been included within the first category, since the service tenure and conditions of these employees remained the same. Not to accept railway employees as central government staff was a violation by Pakistan of its own category. Secondly, it can be argued that the category of divided family applied by Pakistan was unilaterally determined and was more restrictive than that identified by ICRC in their letter requesting options regarding repatriation. It is estimated that 75 per cent of Bihari families were separated because of the restrictive application of the definition on divided families, since grand-parents, parents, unmarried siblings were not considered as part of the same family for the issuance of clearance documents.⁸² Bangladesh has asserted the need for the acceptance of a broader and Islamic definition of the family, since the present definition is too narrow and restrictive, based as it is on the western concept of the family.⁸³ This argument upholds family reunification as one of the fundamental provisions of refugee law and central to the most appropriate durable solution, repatriation.

Thirdly, it had been agreed between Pakistan and Bangladesh that the antecedents of the persons who returned to Pakistan as hardship cases would

⁸⁰ *Bangladesh-Pakistan-India Agreement*, above n. 77, para. 12.

⁸¹ *Ibid.*

⁸² This was further emphasized by Nasim Khan. See Proceeding Report, *International Conference to Consider the Plight of the Non-Bengalis in Bangladesh Who Opt to go to Pakistan*, International Council of Voluntary Agencies, Geneva (13–14 Dec. 1982), Annexures III.

⁸³ The term family was defined to include *only* the husband, wife and children under 18. See Proceeding Report, *International Conference*, above n. 82, Annexures IV; Salahuddin, M, *Citizens of Utopia*, Impact International, 25 July–7 August 1980.

be examined. If it were to be established that they fell within the other two categories, then additional hardship cases would be included. At the outset, the definitional and numeric limits of the hardship cases caused a legal anomaly, since an explanation is required as to why Pakistan limited the number to 25,000. In reality, the hardship cases included Biharis who were within the other two categories, and were not victims of war, orphans or disabled persons.⁸⁴ Over the years since, Pakistan has failed to give a breakdown of the number of persons who were listed under all categories, as well as the vacancies in the hardship category.

The denationalization of Biharis by Pakistan is an abuse of human rights under international law through denial of their duty to admit nationals, thereby imposing a burden on the State of residence.

2.3 International status of Biharis as *de facto* stateless refugees

The denationalization of Biharis by Pakistan effectively rendered them stateless refugees. While objective proof to support the claim of Biharis as convention refugees was earlier provided beyond reasonable doubt, this section will consider their eligibility as *de facto* stateless refugees, in accordance with article 1A(2) CSR51.

The issue of statelessness received preliminary attention in 1947 when the Commission on Human Rights requested the UN to give consideration to the legal status of persons who did not enjoy the protection of any government, in particular pending the acquisition of nationality, as regards their legal and social protection. In response, the Secretary-General, on a request by the Economic and Social Council, undertook a study⁸⁵ in consultation with the International Refugee Organisation (IRO), on refugees who were *de jure* or *de facto* stateless. The study divided the legal analysis into issues of status, and of the elimination of statelessness in relation to refugees.⁸⁶ The international codification of elimination and reduction was taken up by the International Law Commission.

In response to the Secretary-General's report, the Economic and Social Council appointed an *Ad hoc* Committee for both refugees and stateless persons; the position of stateless persons was said to be the same as that of refugees, as both were lacking the protection and assistance of a State.⁸⁷ A combination of factors, including the impending liquidation of the IRO

⁸⁴ Proceeding Report, *International Conference*, above n. 82, 5.

⁸⁵ *A Study on Statelessness*, UN doc. E/1113 and Add.1(1949).

⁸⁶ Batchelor, Carol, 'Stateless Persons: Some Gaps in International Protection', 7 *IJRL* 241 (1995). It has been argued that this division was in fact implicit in the ECOSOC res. 116D(VI), 1-2 Mar. 1948, which requested the Secretary-General (a) to undertake a study of the existing situation in relation to the protection of stateless persons and (b) to undertake a study of national legislation and international agreements and conventions relevant to statelessness. It is clearly evidenced that (a) dealt with the status of refugees and (b) with the elimination and reduction.

⁸⁷ Batchelor, *Stateless Persons*, above n. 86, 243.

and the need for a new organization, led the *Ad hoc* Committee to observe,

In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself to the problem of refugees, whether stateless or not . . .⁸⁸

For reasons of time, lack of authority, the creation of an independent instrument, and the fact that the Convention relating to the Status of Stateless Persons was not in place, although the ILC seemed in favour of it, the ILC rejected the suggestion of the Special Rapporteur that *de facto* stateless persons should be assimilated with *de jure* stateless persons,⁸⁹ so as to receive the status of protected persons and the right to naturalization should they renounce their ineffective nationality. In fact, persons who are *de jure* nationals of a State, but who are without its effective protection, can be categorized as *de facto* stateless refugees, when statelessness is the result of persecution in the State of origin.⁹⁰ It can be concluded that Hudson's *de facto* unprotected persons are, in reality, *de facto* stateless refugees.

More importantly in this connection, article 1A(2) enumerates four requisites for a person to be regarded as a refugee under the Convention; he or she (1) must have a well-founded fear of persecution; (2) the persecution in question must be based on his or her race, religion, nationality, membership of a particular social group or political opinion; (3) he or she must be outside his country of nationality, or if a stateless person, outside his or her country of former habitual residence; and (4) must be unable or, owing to fear of persecution, unwilling to avail himself of the protection of the country of nationality. Alternatively, if he is a stateless person, he must be unable or unwilling to return to his country of former habitual residence.⁹¹

This article distinguishes refugees with a nationality and refugees without a nationality. For the former, supported by sub-clause 5, the

⁸⁸ *Report of the Ad hoc Committee on Statelessness and Related Problems*, UN doc. E/1618 and Corr.1, 17 Feb. 1950 at 120.

⁸⁹ *Report of the International Law Commission*, A/CN.4/88 (1954) 8. The Special Rapporteur Manley Hudson had commented that '[p]urely formal solutions . . . might reduce the number of stateless persons but not the number of unprotected persons. This might lead to a shifting from statelessness *de jure* to statelessness *de facto*'. He further had stated that the 'so-called stateless persons *de facto* are nationals of a State who are outside its territory and devoid of its protection; and to call this group *de facto* unprotected persons, in distinction to *de jure* unprotected persons ie stateless persons'. See Hudson, Manley, *Report on Nationality, Including Statelessness*, International Law Commission, UN doc. A/CN.4/50 (21 Feb. 1952) 49.

⁹⁰ This argument is further corroborated by Goodwin-Gill, who states 'Refugee status . . . might appear determinable in the light of the situation prevailing in the country of origin as the "country of former habitual residence"'. He dismisses Hathaway by stating in a footnote that '[t]here is no historical, textual or commonsensical basis for the view that because a stateless person is not "returnable" to his or her country of former habitual residence, so he or she is not in danger of being *refouled* and therefore not a refugee': see Goodwin-Gill, *Refugee*, 42.

⁹¹ Stenberg, Gunnell, *Non-Expulsion and Non-Refoulement*, Iustus Forlag, Uppsala (1990) 60.

relevant criterion is that they are unable or unwilling to avail themselves of the protection of their State of nationality, while the latter are unable or unwilling to return to their State of former residence.⁹² Alongside the inability to return to their State of former residence, stateless refugees need to demonstrate a well-founded fear of persecution as a result of the deprivation of nationality as the principle reason in support of their claim to refugee status.

Though stateless persons and refugees are not identical,⁹³ both refugees and *de facto* stateless persons suffer from the lack of national protection.⁹⁴ After having fled East Pakistan as a result of persecution, Biharis were subjected to denationalization. Although having been deprived of *de jure* nationality, the formal link with Pakistan remains, a link which commenced after the partition of India in 1947, when the religious community of Bihari Muslims emigrated to the Eastern province of Pakistan. The Biharis' move to Pakistan was a direct result of their intention to make Pakistan their country of habitual residence. As formerly observed and corroborated by Table 2, in the years between 1947 and 1971, the Bihari community became well-established in Pakistan in small scale industry, trade and commerce. Since then, and for all purposes under international law, Pakistan constitutes their country of 'former habitual residence'.

While denationalization in the presence of this link provides a 'compelling testimony of denial of protection' by the country of origin,⁹⁵ Goodwin-Gill emphasizes that 'the expulsion of an unwanted minority could not justifiably be predicated upon the municipal act of deprivation of citizenship',⁹⁶ since the grant of nationality is no longer the exclusive prerogative of States. Hence, the denial of protection due to denationalization strengthens the Biharis' claim for refugee status.⁹⁷ Soon after statehood, Bangladesh was

⁹² Goodwin-Gill, *Refugee*, 41.

⁹³ Goodwin-Gill, *Refugee*, 42. He had earlier noted: 'Stateless persons have not been historically distinguished. Refugees and stateless persons [w]alked hand in hand, and after the First World War, their numbers and condition were almost coterminous . . . their paths diverged, with refugees being identified by reference to the reasons of flight, and their statelessness, if it existed, (was) seen as incidental to the primary cause', Goodwin-Gill, G.S., 'The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection', in Saksena, K.P., ed., *Human Rights Perspectives and Challenges (in 1990 and Beyond)*, Lancer Books, New Delhi (1994) 389-90.

⁹⁴ Batchelor, *Stateless Persons*, above n. 86, 239.

⁹⁵ Goodwin-Gill, *Refugee*, 42.

⁹⁶ Ibid. Also Fisher Williams, J, 'Denationalization', 8 *BYIL* (1927) 45.

⁹⁷ Art. 27 ICCPR66 provides that '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. The Bihari can be termed as a national minority of Pakistan, based on their ethnic origin and difference. With regard to refugee status, and drawing on art. 27, the persecution by Pakistan of her national minority (that is, Biharis) occurred by the denial to the minority's right to return to their country of habitual residence. It is obvious that the State practice of the denial of nationality and the resultant persecution, would qualify the Biharis for refugee status on reasons, apart from others, of nationality. See Grahl-Madsen, A., *The Status of Refugees in International Law*, vol.1, (1966) 218-9.

hostile to the Biharis because of their alleged political opinions and cultural, linguistic and ethnic affiliations with Pakistan.⁹⁸ Viewed as patriotic Pakistan nationals by the Bangladeshis, the Biharis were victims of persecution in Bangladesh and were not allowed to return to Pakistan their country of habitual residence. Therefore, it is argued that the Biharis qualify as both refugees under the 1951 Convention and *de facto* stateless refugees as they are 'unable . . . to return to their State of former residence',⁹⁹ as a result of their denationalization by Pakistan.¹⁰⁰

If persons became stateless for political reasons, they should be treated as refugees.¹⁰¹ The obviousness of this logic was clarified by the Convention Relating to the Status of Stateless Persons of 28 September 1954 which sought a definition that did not overlap with the *de facto* stateless of the CSR51. The assumption was that *de facto* stateless persons are refugees,¹⁰² and contracting States might object to acceptance of obligations on behalf of both *de facto* and *de jure* stateless persons.¹⁰³

The inability of a national to gain protection can range from a 'conscious, premeditated denial of protection to factual inability on the part of the country of nationality to accord it. The reasons for the inability are . . . immaterial, but refusal to accord protection may be an indication of a threat to protection'.¹⁰⁴ The general failure of Pakistan to accord protection to Biharis between December 1970 and December 1971 evidences denial of protection for over a year and the process of denationalization over the last 28 years, upholds arguments in support of their status as *de facto* stateless refugees in international law.

⁹⁸ Linguistic minorities have been studied, among others, in Capotorti, F., *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN doc. E/CN.4/Sub.2/384/Rev.1 (1978); *Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*: UN doc. E/CN.4/1994/72 (13 Dec. 1993).

⁹⁹ Goodwin-Gill, *Refugee*, 41. In addition, the *travaux préparatoires* of the 1951 Convention provide further evidence in favour of the Biharis as *de facto* stateless refugees. The *Ad Hoc* Committee agreed that 'unable', hence the inability, referred to stateless refugees who possessed a nationality but are refused passports or other protection by their governments. See Report of the *Ad Hoc* Committee, UN doc. E/1618 at 39.

¹⁰⁰ It has been argued that persecution for reasons of nationality is also understood to include persecution because of lack of nationality, resulting in statelessness. See Grahl-Madsen, *Status of Refugees*, 219.

¹⁰¹ However, if they renounced their nationality for personal convenience, they would not be entitled to special protection. See UN doc. E/CONF.17/SR.10, 11.

¹⁰² Brownlie proposes that '... large numbers of refugees may retain a *de jure* nationality for which they have no use and so are referred to as "*de facto* stateless".' See Brownlie, Ian, *Principles of Public International Law*, (5th ed., 1999) 560.

¹⁰³ Batchelor, *Stateless Persons*, above n. 86, 248.

¹⁰⁴ Stenberg, *Non-Expulsion and Non-Refoulement*, above n. 91, 76.

Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia — Part 2

SUMIT SEN*

Abstract

This article examines the situation of stateless refugees in international law, in the context of the forced population displacement of the Bihari refugees of Pakistan in Bangladesh. The partition of India and the subsequent creation of Pakistan in 1947 led to the displacement of the Biharis, and with the creation of Bangladesh in 1971, the Biharis were forced to flee a second time. However, their international legal status as refugees has seldom been recognized in international law. Part 1 of this article, comprising Sections 1 and 2, was published in the last issue of the *IJRL* (Volume 11 Number 4); it provided the background to the present problem, and showed that the Biharis' claim to Convention refugee status is well-founded, on the basis of a well-founded fear of persecution for reasons of nationality and political opinion, even and despite the succession of Bangladesh from Pakistan and the subsequent denationalization of Biharis by Pakistan which made them *de facto* stateless refugees. Part 2, comprising Sections 3 and 4, is published below; it examines the nationality entitlement of the Bihari refugees' and considers their right to return to Pakistan, their country of nationality, as a central factor in any legal solution for them, based on the right to return in international law.

3. The Right to a Nationality

Lauterpacht argued for the recognition of the right to a nationality, since nationality forms the indispensable link between the individual and international law.¹ He suggested that denationalization resulting in

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¹ Lauterpacht, H, *International Law and Human Rights*, Archon Books, USA (1968) 346-50.

statelessness would be arbitrary, and any deprivation would be incompatible with international human rights norms, especially since the right to a nationality is regarded as a fundamental human right.²

In an advisory opinion,³ the American Court of Human Rights reflected on the right to have a nationality entailing a minimum measure of legal protection in international law, and on individual protection against arbitrary deprivation of all political and civil rights tied to nationality.⁴ In confirming the inherent nature of the right to a nationality within international law, the Court observed that:

It is generally accepted today that nationality is an inherent right of all human beings ... nationality cannot today be deemed within their [States] sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights. The classical doctrinal position ... has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the State as well as human rights issues.⁵

In balancing State sovereignty and human rights law, the Court stated that:

[I]n order to arrive at a satisfactory interpretation of the right to nationality ... it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the State, that is, they are matters to be determined by the domestic law of the State, with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights.⁶

3.1 Real and effective nationality

While sections 1 and 2 have argued that the Biharis were rendered *de facto* stateless refugees as a result of denationalization, this section reviews the general principles of international law in respect of their 'real and effective nationality'. In this regard, it has been argued that States cannot plead provisions of internal law in the justification of international wrongs. The principles needed to assess this problem would include whether the manipulation of the law of nationality is part of delictual conduct,⁷ and whether the general principle of a genuine link was set aside in the conferment of nationality.

Whereas the doctrine of effective link has been recognized in

² Ibid., 4–5.

³ *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 5 HRLJ 167 (1984).

⁴ See Chan, *The Right to a Nationality*, 5.

⁵ See *Re Amendments to the Naturalization Provisions*, above n.3, 32–3.

⁶ Ibid.

⁷ Brownlie, I., 'The Relations of Nationality in Public International Law', 39 *BYIL* 284, 327–8 (1963).

international legal literature,⁸ the doctrine of effective nationality was established in the *Nottebohm* case. While the internal legislation of States makes general use of residence, domicile, immigration and membership of ethnic groups associated with the territory as connecting factors, 'international law has rested on the same principles in dealing with the situations . . . [as also] when certain parts of the population are outside nationality legislation'.⁹

In developing the legal policy relating to nationality, the principle of real and effective nationality applied by the Court was stated to be one of relatively close factual connection. The Court said:

International arbitrators . . . have given their preference to the real and effective nationality [test], that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration . . . the habitual residence of the individual is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children . . . [The practices of a number of States] manifest the view of these States that . . . nationality must correspond to the factual situation.

The Court ruled further that in the general context, the juridical expression of the individual's connection with the State, and therefore its nationality, 'are of a character that they demand certainty . . . There must be objective tests, readily established for the existence and recognition of that status'.¹⁰ For this purpose, the Court proposed that:

According to the practice of States, to arbitral and judicial decisions and to the opinion of the writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

While the individual exists for the State as a person bound to it by the link of citizenship, it is by no means clear that this is *the* essential legal bond sufficient to create the claim of loyalty. There seems to be a deeper connection, of 'belonging', going beyond mere citizenship and statehood. It is belonging that 'struggle(d) to create . . . a search for authenticity',¹¹ which culminated in the birth of Pakistan in 1947 and was the reason for the movement of Biharis to East Pakistan. In its efforts at rehabilitation, Pakistan provided special incentives to the Bihari refugees from India,

⁸ See Weis, P., *Nationality and Statelessness in International Law*, (2nd ed., 1979), 191–2; Makarov, RDC, I (1949) 74.

⁹ Brownlie, 'Relations of Nationality', 350.

¹⁰ See Opinion of Judge Read, *Nottebohm Case*, ICJ Reports (1955), 46.

¹¹ The linkages of minorities and the 'secessionist sense of self-determination' [seems to be built essentially] 'upon a romantic or a *rousseauesque* approach'; Koskenniemi, M., 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* 250 (1994).

the object of which was to secure protection for ethnic minorities which differed in race and language, with the possibility of living peacefully alongside the Bengali population. The approach linked the *raison d'être* of Partition to the purposive criteria of preserving and developing special characteristics of Pakistani statehood.¹²

After 1947, Biharis were integrated with 'only those non-dominant groups in a population which possess(ed) and wish(ed) to preserve stable ethnic, religious and linguistic traditions ... and ... (were) loyal to the State of which they [were] nationals'.¹³ Although always minorities in East Pakistan, Biharis remained a group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members, being nationals of Pakistan, possessed ethnic and linguistic characteristics differing from those of the rest of the population.¹⁴ Up until 1971, however, they were nationals, having a legal bond with its basis in a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties, thus emphasizing equality in fact and in law.¹⁵ Afterwards, as explained in sections 1 and 2, the majority of Biharis were denationalized by Pakistan.

Brownlie has considered whether an effective nationality can exist even in the absence of a formal status in the internal law of the State concerned.¹⁶ He argues that the judgment in the *Nottebohm* case presents the principle of effective nationality in terms of the links between the life of the *de cuius* and the population of the State in relation to the social fact of attachment, where 'the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance ...'.¹⁷ He concludes that:

The effective link doctrine is an inevitable product of the process whereby nationality is placed in a proper relation to international law as a general system. There must be a system of attribution for individuals and populations on the international plane, and [especially in] the consequences of wide reliance on nationality as a reference in various parts of international law ... The logic of the judgment of *Nottebohm* in regard to the fundamental aspects of nationality is

¹² Shaw, *The Definition of Minorities*, op.cit.

¹³ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN doc. E/CN.4/641 Annex I, Resolution II (1950).

¹⁴ See Capotorti, F., 'Study of the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities', UN doc. E/CN.4/Sub.2/384/Rev.1 (1979).

¹⁵ Jules Deschenes defined a minority as a 'group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law': UN doc. E/CN.4/Sub.2/1985/31.

¹⁶ Brownlie, *Relations of Nationality*, 358–63.

¹⁷ Dissenting Opinion of Judge Read, above n.10. 44–5.

unimpeachable . . . [and the] evidence of practice both before and since *Nottebohm*, as well as the logical force of other principles of international law, justify the conclusion that the principle of effective nationality is a general principle of international law and should be recognized as such.¹⁸

3.2 Right of option

This section assesses the effect of territorial change in redefining the status of an individual, and discusses the question of real and effective nationality with respect to the State succession of Bangladesh in relation to the Biharis' right of option. While the rules and practice of States are based on the assumption that States administer the grant of nationality, general principles of real and effective nationality 'call for expressions of will on the part of individuals directly or indirectly . . .',¹⁹ in affirming their right of option. In this regard, the principle of effective link is considered to underlie much of the State practice on State succession.²⁰

While 'State succession' is 'employed to describe an area, or a source of problems . . . the term does not connote any principle or presumption that a transmission or succession of legal rights and duties occurs.'²¹ The succession, however, had direct consequences for potential refugees, particularly in regard to nationality. Many international lawyers are of the view that the private rights of individuals are not affected by a change of sovereignty, basing themselves on the principle of respect for acquired rights in international law, which maintains that a change of sovereignty should not touch the interests of individuals more than is necessary.²² However, when the change of sovereignty provides a certain basis for persecution and the successor State fails to comply with the minimum standards of international law and its obligation to protect its nationals, then the issue of State succession is highly relevant to the acquisition of nationality. Since the persecution of the Biharis continued despite the change of State,²³ it would be difficult to argue that persons attached to the territory of East Pakistan changed their nationality when East Pakistan became Bangladesh.²⁴

While the traditional doctrine of international law has argued for inhabitants in the successor State to accept the nationality of that State, the modern basis of nationality change must be in accord with human and political realities.²⁵ Brownlie argues that the 'evidence is overwhelmingly

¹⁸ Brownlie, *Relations of Nationality*, 364.

¹⁹ *Ibid.*, 340.

²⁰ See ILC *Yearbook*, Vol. I (1953) 319–26.

²¹ Brownlie, I., *Principles of Public International Law*, 5th ed., 1998, 630.

²² O'Connell, D. P., *State Succession in Municipal and International Law*, 2nd ed., vol. I (1970) 377–81.

²³ See Part 1 of this article, sections 2.1.3 and 2.1.4.

²⁴ See Jennings and Watts, eds., *Oppenheim's International Law*, vol. I, 551, 571, 656–7.

²⁵ Brownlie, *Principles*, 657.

in support of the view that the population follows the change of sovereignty',²⁶ given that the social fact of attachment of the predecessor State and that of the inhabitants of the successor State were of no legal consequence. While O'Connell holds that there is no automatic change of nationality with territorial change,²⁷ Crawford, in reconciling the Brownlie and O'Connell views, argues that in the absence of provisions to the contrary, persons habitually resident in the territory of the new State acquire the nationality of that State. Graupner also denies the existence of any automatic change, arguing that some form of submission, explicit or tacit, is required before nationality is acquired.²⁸

In support of this last-mentioned position, it may be said that there is no rule in international law under which the nationals of the predecessor State acquire the nationality of the successor State, although States in general have conferred nationality on former nationals of the predecessor State.²⁹ With regard to the Biharis, it may be argued as a matter of international law, that Pakistan as the predecessor State is under an obligation *vis-à-vis* Bangladesh, the successor State, to withdraw its nationality if and when the Biharis acquire the nationality of Bangladesh. However, since the displacement of the Biharis was not voluntary and the Biharis retained their Pakistani nationality, they did not qualify for Bangladeshi nationality, and hence, denationalization by Pakistan violated international law.

Crawford considers that, in the absence of provisions to the contrary, persons habitually resident in the territory of the new State acquire the nationality of the State. Since provisions in the New Delhi Agreement provide for the option for 'non-Bengalis' to return, it can be argued that in the light of explicit treaty provisions, Biharis would *not* automatically acquire the nationality of Bangladesh. Brownlie does not address the legality of population transfer, but instead provides instances of the 'voluntary exercise of rights of option'.³⁰ Having stated that 'the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality', he corroborates the right of option as a 'later and additional procedure (in treaties) . . . [O]nly if and when the choice is made, does the nationality of the successor State terminate'.³¹ While compulsory naturalization has often been associated with territorial change,³² '[u]pon occasion, however, these harsh doctrines

²⁶ Brownlie, 'Relations of Nationality', 320.

²⁷ O'Connell, *State Succession*, vol. I, 503.

²⁸ Graupner, 'Nationality and State Succession — General Principles of the Effect of Territorial Changes on Individuals in International Law', *Transactions of the Grotius Society* (1946) 87–120.

²⁹ See Weis, *Nationality and Statelessness*, 143–4.

³⁰ Brownlie, 'Relations of Nationality', 326.

³¹ *Ibid.*, 320. Drawing on Brownlie, since Biharis had cast their choice, they cannot be deemed to have acquired the nationality of Bangladesh.

³² Mann, F., 'The Effects of Changes of Sovereignty upon Nationality', 5 *MLR* 218 (1942); Weis, *Nationality and Statelessness*, 139–64.

are modified in deference to human rights and self-determination ... [S]tate practice seeks to allow individual inhabitants of the ceded territory an option on nationality, including the retention of the original nationality'.³³

The existence of the right of option to be enjoyed by all persons affected by territorial changes has been argued by others. In a draft convention, the Harvard Law Research Group, discussed the possibility of the inhabitants of the transferred territory repudiating the nationality of the acquiring State, 'in accordance with the law of the successor State'.³⁴ However, the most noteworthy exploration of this topic was presented by Kunz,³⁵ who discussed the 'older right of option', that is, the right of the individual to emigrate from the transferred territory (option of emigration) and thereby implicitly repudiating the nationality of the successor State, compared with the 'modern right of option', namely, the right to make a declaration of refusal to acquire the nationality of the successor State (option of nationality).³⁶

Although treaty practice with regard to the right of option is not universal, it is nonetheless widespread. Westlake³⁷ and Fauchille³⁸ have shown 'that a right of option has been accorded in a great number of treaties concluded in Europe and America', with the practice reaching its climax after the First World War.³⁹ Reaffirming Kunz, Weis considered the right of option as 'international law in development', which nevertheless cannot be presumed in the absence of treaty provisions.⁴⁰

The right of option was further emphasized as a rule of international law by Lord McNair, who stated that 'it is becoming increasingly common to give such nationals an option ... to leave the territory and retain their nationality'.⁴¹ In this regard, the Biharis, as traditional minorities⁴² of

³³ See Jennings and Watts, *Oppenheim's International Law*; Gettys, 'The Effect of Changes of Sovereignty on Nationality', 21 *AJIL* 268–71 (1927); McDougal, Lasswell, Chen, 'Nationality and Human Rights: The Protection of the Individual in External Arenas', in *Human Rights and World Public Order*, Yale University Press, New Haven and London (1980) 861–958 at 885.

³⁴ Art. 18(1), (2). See Inter-American Juridical Committee, *Report and Draft Convention on the Nationality and Status of Stateless Persons*, Department of Law, Pan-American Union, Washington (1952).

³⁵ See, among others, Kunz, J., 'L'option de nationalité', *RCADI*, I (1930) 109; 'Nationality and Option Clauses in the Italian Peace Treaty', 41 *AJIL* 622 (1947).

³⁶ In the latter case, the successor State may demand the removal of the optant from its territory. While removal is not an essential part of the right of option, it may be a condition for the exercise of the right of option, and will usually be the consequence of an exercise of the right. Kunz, 'L'option de nationalité', above n.35, 134.

³⁷ Westlake, *International Law*, vol. I, 71.

³⁸ Fauchille, *Traité de Droit International Public*, vol. 1, 858–76.

³⁹ Weis, *Nationality and Statelessness*, 161.

⁴⁰ Weis argues that 'it cannot be concluded, from widespread but not universal treaty practice, that there exists a rule of international law imposing a duty on the States concerned in a transfer of territory to grant to the inhabitants of the transferred territory a right of option to decline (or acquire) the nationality of that State': *ibid.*, 163.

⁴¹ McNair, *International Law Opinions*, vol. 2, 24.

⁴² For effective protection of minorities, see 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities': UNGA res.47/135 (1992).

Pakistan and now *de facto* stateless refugees, can be seen to have exercised the older right of option (option of emigration) and thereby implicitly to have repudiated the nationality of the successor State soon after the independence of Bangladesh in 1971. However, awaiting their return to Pakistan, they exercised their modern right of option (option of nationality), in making a declaration of refusal to acquire the nationality of Bangladesh. Their right of option,⁴³ building on their right to self-determination, has been ignored by Pakistan.

The rights of minorities and the issue of self-determination are two sides of the same coin.⁴⁴ While issues of ethnic diversity and diverging political interests within Pakistan led to self-determination for Bengalis, the real function of the principles of human rights should allow all 'peoples' to have the right of self-determination.⁴⁵ By virtue of that right, evidenced by the established norm of the right of option in international law, the Biharis wished to exercise their rights to have recognition of their status as Pakistanis. Interestingly, just before the independence of Bangladesh, 'the principle [became] a legally binding right, ...'⁴⁶ and was followed by another international legal declaration.⁴⁷ That the Bihari refugees' demonstrated 'quality of endurance' in the retention of their nationality as an issue of self-determination,⁴⁸ reaffirms their right of option, as exercised in 1971.

Self-determination has operated within the framework of the principle of territorial integrity to prevent a rule authorizing secession from an independent State,⁴⁹ thus reaffirming a 'significant presumption'⁵⁰ against the operation of self-determination. While self-determination as a legal right applies only to a recognized non-self-governing territorial situation, an assessment of Chapter XI of the UN Charter shows an impetus for the development of self-determination with a real possibility of implementation where the territorial aspect is vital.

⁴³ Also see Mikulka, Vaclav, 'Legal Problems Arising from the Dissolution of States in Relations to the Refugee Phenomenon', in Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague/Boston/London (1996), 39.

⁴⁴ Thornberry, Patrick, 'Self Determination, Minorities, Human Rights: A Review of International Instruments', 38 *ICLQ* 867 (1989).

⁴⁵ UNGA res. 2200A(XXI) (1966).

⁴⁶ Shaw, M., 'The Definition of Minorities in International Law', in Dinstein, Y. & Tabory, M., eds., *Protection of Minorities and Human Rights*, Dordrecht, 1992, 1, 17.

⁴⁷ 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', 1970.

⁴⁸ Thornberry, 'Self Determination, Minorities, Human Rights', above n.44.

⁴⁹ The 'domestication of national self-determination' in James Mayall's writing, *Nationalism and International Society*, provides an interesting and different point of view. Koskenniemi observes that limiting national self-determination to decolonization has 'always seemed somehow arbitrary': Koskenniemi, M., 'National Self Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* 241, 242 (1994).

⁵⁰ Shaw, 'Definition of Minorities', above n.46, 17.

While the UN has built a consensus on self-determination of colonial people,⁵¹ articles 1(2) and 55 of the Charter approach the principle while using the terms State, nation and peoples, where peoples refer to groups of human beings who may, or may not, comprise a State or nation.⁵² Although the Commission on Human Rights has failed to reach a conclusion, there is support for the term to be restricted to the inhabitants of a particular State or colony.⁵³

Though the territorial conception of self-determination within the reality of mixed populations, with their differing cultures, languages and religions, weighs heavily towards taking political demarcations as they stand,⁵⁴ the situation for the Biharis is different. The Bihari community had not integrated with the majority population of East Pakistan. Although their community identity was substantially preserved, they wanted voluntary repatriation only when the political demarcations of Pakistan were irrevocably altered. Possessing 'ethnic (and) linguistic characteristics differing from those of the rest of the population',⁵⁵ and intending to maintain their specificity and preserve their identity from the majority of the population, the effort of the Bihari refugees' 'collective will to survive'⁵⁶ has been a question of fact, and not in the law as selectively applied by Pakistan.⁵⁷ Thus, within international practice, the right to self-determination of Biharis, evidenced through their right of option, is not a departure from international standards, but simply a reaffirmation of the human rights of a national minority group and their collective will to survive in the face of well-founded fear of persecution.⁵⁸

The assumption that self-determination authorizes secession by groups is incorrect. Self-determination is rather, as the Committee for Human Rights has made clear in its examination of States' reports under article 40 ICCPR66, concerned with the accountability of governments, participation, and real choice for the peoples in matters of political and

⁵¹ UNGA res. 1541(XV) requires '(p)rima facie ... obligation ... to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'.

⁵² Thornberry, 'Self Determination, Minorities, Human Rights', above n.44.

⁵³ Shaw, 'Definition of Minorities', above n.46, 17.

⁵⁴ Thornberry, 'Self Determination, Minorities, Human Rights' above n.44.

⁵⁵ Capotorti, above n.14.

⁵⁶ Deschenes, above n.15.

⁵⁷ This contradicts established norms of international law. See *Greco-Bulgarian Communities case*, PCIJ Ser. B, No. 17, 1930, 32.

⁵⁸ Further, the rule of non-discrimination and equality in law should move towards equality in fact, where the continued existence of the minority group is not placed in jeopardy, by practice of non-return of nationals, as is evidenced for the Bihari *de facto* stateless refugees. See Thornberry, 'Self-Determination, Minorities, Human Rights', above n.44.

economic policy.⁵⁹ Further, their right to option, as an attribute of the principle of self-determination, has been reaffirmed in recent international legal practice. The Arbitration Commission of the International Conference on the Former Yugoslavia considered using the right of option, wherein an 'individual may choose to belong to whatever ethnic, religious or language community he or she wishes'.⁶⁰ For the Bihari community, this right of option was offered by Pakistan and Bangladesh through the ICRC, and needs to be respected by Pakistan as an international obligation.

Traditionally, international law has provided minorities with little recourse as regards self-determination; greater adherence to the basic rules of human rights law is therefore required.⁶¹ The Bihari refugees' right to self-determination, ascribable in their right of option, is well-founded in international law.⁶²

3.3 Recognition of legal personality

In arguing for the *de jure* right to a nationality of the Bihari *de facto* stateless refugees, and drawing on their established right of option in international law, this section analyses their juridical personality, that is, the right to recognition as a person before the law.⁶³ 'It is one of the individual's rights of existence'; recognition of legal personality is a necessary prerequisite to

⁵⁹ Higgins, Rosalyn, 'Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System', in *Liber Amicorum for Henry Schermers*, Dordrecht, 1994, 193, 197. However, Thornberry has stated that the Committee's comment is neither optimistic or illuminating. States do not find much use for article 1 'internally.' But the Comment incorporates a view about self-determination 'underlying' human rights: 'The right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights.' The application of internal self-determination is to be gauged with reference to human rights, and not to ideologies beyond it. Violations of self-determination are violations of human rights. Thornberry, 'Self-Determination, Minorities and Human Rights', above n.44, 883.

⁶⁰ Opinion No.2, 11 Jan. 1992, 31 *ILM* (1992) 1498.

⁶¹ Here Koskeniemi observes '(t)he discourse of self-determination contains little that is self-evident or on which everyone can agree ... [W]e international lawyers have only ourselves to blame for the legal force presently enjoyed by claims of national self-determination. We owe it those *whose lives have been devastated by the ongoing xenophobic hysteria* to examine what is involved in contagious nature and whether a meaningful legal sense can be extracted out of the available propaganda': Martti Koskeniemi, 'National Self-Determination Today', above n.49, 244 (emphasis added).

⁶² See Crawford, J., *The Creation of States in International Law*, (1979); International Commission of Jurists, *The Events in East Pakistan 1971* (1972); Report of Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Quest for Justice* (1987). Thornberry laments that the endorsement of minority rights is 'more limited' than art. 27 ICCPR66: 'The different minorities are narrowed down to "national" minorities, implying a limitation of scope; there is no consideration of a "right to identity", only to equality before law.' On the other hand, Cassese points to Principle VIII, which includes '... the principle of equal rights and self-determination of peoples, all peoples *always* have the right, in *full freedom*, to determine, *when and as they wish, their internal and external political status*, without external political interference, and to pursue as they wish their political, economic, social and cultural development': *Self-Determination of Peoples*, Cambridge, 1995.

⁶³ Art. 16 ICCPR66.

all other rights of the individual and consequently constitutes a non-derogable right.⁶⁴

Article 16 ICCPR66 endows the individual with the ‘capacity to be a person before the law’, and must be distinguished from the ‘capacity to act, to establish rights and duties by way of one’s conduct’. Since the Biharis have been subjected to denationalization by Pakistan, leading to their present status as *de facto* stateless refugees, the recognition of their legal personality requires attention. Article 16, corresponding to article 6 UDHR48, indicates that recognition of legal personality must be accompanied by the grant of private rights. The inconsistencies in the *travaux préparatoires*, regarding the ‘capacity to be a person before the law’ and ‘capacity to act’, were settled by the Third Committee of the General Assembly, which conclusively provided that article 16 related to the capacity to be a person before the law and did not cover the capacity to act.⁶⁵

While the practical significance of article 16 has been questioned, the ‘recognition of legal personality’ helps provide a systematic interpretation of all other human rights provisions. Although *de jure* persons possess *ex definitione* legal personality, Bihari refugees lack the usual attributes of nationality due to their denationalization by Pakistan. Article 16 provides the international legal basis in respect of the rights to a nationality, of option to choose and their right to return.

4. Right to Return in International Law

The existence of the right to return, and the corresponding duty to admit by the concerned State, are beyond dispute as principles of international law.⁶⁶ The right to return of Biharis will be approached from the perspective of international law, drawing on the Biharis’ right to a nationality, the international legal norms relating to the right of option and recognition of their legal personality. While not implying the political feasibility of repatriation, the past practice of Pakistan between 1971–1999 will be mentioned to illustrate its policy.

Since the right to return has been recognized in numerous human rights provisions, constitutions and jurisprudence of countries, in resolutions of

⁶⁴ Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 282.

⁶⁵ See UN doc. A/C.3/SR.1014, 7 Nov. 1960.

⁶⁶ See *Van Dijn v. Home Office*, 1 CMLR (1975) 18, where the European Court of Justice stated that as ‘a principle of international law ... a State is precluded from refusing to its own nationals the right of entry or residence’.

the UN⁶⁷ and the wide operational experience of the UNHCR,⁶⁸ it has been argued that the right exists in customary international law, although 'its precise contents (are) difficult to define'.⁶⁹ The right to return to one's own country is provided *expressis verbis* in article 9 UDHR48, which prohibits 'arbitrary arrest, detention or exile', and in article 13(2) UDHR48, providing that '[e]veryone . . . the right to leave any country, including his own, and to return to his country'.⁷⁰ This human rights dimension is important for refugees, since repatriation is premised upon their right to return to their own country in conditions of security.⁷¹ In the context, the 'prohibition of exile' merits restatement, since the exile of nationals is arguably prohibited under general international law.⁷²

The right to return is incorporated as an 'absolute entitlement'⁷³ in article 12(4) ICCPR66, where the term 'his own country' suggests the bond between the claimant and the State to which he or she is claiming to return. The meaning of 'to enter' is wider in scope than the term 'return', since the former applies to persons who have been born abroad, thus allowing these persons to enter their country for the first time.⁷⁴ In fact, the *travaux préparatoires* of ICCPR66 support this interpretation.⁷⁵ Interestingly, the debate within the UN Commission on Human Rights and General Assembly on the adoption of article 12(4) ICCPR66 refers to three distinct groups: (a) nationals/citizens of a country living or who have lived in the country; (b) nationals/citizens born outside the country and who have never lived therein, (c) permanent residents or others who have a legal right to residence within a country and but are not nationals thereof. A change in the formulation of the article, from the right to 'return' to one's country, to the right to 'enter' one's country, was made to include the group under (b), and proposals to clarify the reference to 'one's country' by referring instead to the 'country of which one is a

⁶⁷ See, among others, Mubanga-Chipoya, 'Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own and to Return to His Country': UN doc. E/CN.4/Sub.2/1988/35/Add.1.

⁶⁸ The right to return is implicit in UNHCR's promotion of voluntary repatriation as the most desirable solution to the problems of refugees.

⁶⁹ Lawand, Kathleen, 'The Right to Return of Palestinians in International Law', 8 *IJRL* 544 (1996).

⁷⁰ See UN doc. A/Res/217(III), 10 Dec. 1948.

⁷¹ Goodwin-Gill, G. S., 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, *The Problem of Refugees*, above n.43, 101.

⁷² Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 218.

⁷³ Goodwin-Gill, 'The Right to Leave', above n.71.

⁷⁴ de Rouw, A. C. J., 'Some Aspects of the Right to Leave and to Return with Special Reference to Dutch Law and Practice', XII *Neth. YBIL* 50 (1981).

⁷⁵ Bossuyt, M., *Guide to the 'Travaux Préparatoires' of the International Covenant of Civil and Political Rights*, Martinus Nijhoff, Dordrecht (1987) 261.

national' were rejected on the grounds that they would exclude the category under (c).⁷⁶

Within this understanding, the categorization of the various sections of the Bihari population would inevitably fall under all three categories. First, as citizens of Pakistan before denationalization, they can be termed 'nationals . . . who have lived in the country'. The second category leads from the first category, those who are the legitimate offspring of nationals of Pakistan prior to the said date, and therefore are entitled to the nationality of their parents, although they 'have never lived therein'.

Hannum has contended that the strongest support for the view that article 12(4) refers to 'nationals or citizens' is the Ingles study,⁷⁷ which refers to 'the right of a national to return', rather than to 'enter' his country,⁷⁸ and that '(n)o one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country'.⁷⁹ In this regard, the process of denationalization by Pakistan continues to violate the international norm that '(n)o one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country', since by a process of arbitrary and selective acceptance into its new (erstwhile West Pakistan) territory, the vast majority of the Bihari community became stateless refugees.⁸⁰

Weis was of the view that only nationals are included within the meaning of article 12(4), although he added that the article 'include(s) the State whose nationality the person possessed and of which he has been arbitrarily deprived'.⁸¹ Using this paradigm, it can be argued that the Biharis were nationals of Pakistan since 1947, and that the deprivation of the right to a nationality after twenty-five years constitutes an arbitrary deprivation of human rights by Pakistan.

4.1 One's own country

The relationship of the Bihari community with the State of Pakistan should be located within the expansive interpretation of 'one's own country',⁸² the State with which the individual has an identifiable

⁷⁶ Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster (1987) 56.

⁷⁷ Ingles was the Special Rapporteur for the United Nations 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his own, and to Return to his Country': UN doc. E/CN.4/Sub.2/220/Rev.1 (1963).

⁷⁸ However, art. 12(4) ICCPR66 clearly stipulates that '(n)o one shall be arbitrarily deprived of the right to enter his country'.

⁷⁹ Hannum, *The Right to Leave*, above n. 76, 57.

⁸⁰ For a discussion on the individual and collective aspects of the right to return, see Lawand, Kathleen, 'The Right to Return of Palestinians in International Law', 8 *IJRL* 541-3 (1996).

⁸¹ Weis, *Nationality and Statelessness*, 65.

⁸² For a comparative and contextual understanding of 'one's own country', see Lawand, above n. 80, 548-50.

connection. In this regard, it is appropriate to restate the landmark decision of the ICJ in the *Nottebohm* case,⁸³ where the substance of Nottebohm's links with the State of Liechtenstein was assessed. Applying the determinative criteria of 'tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future' used by the Court to assess linkages in the *Nottebohm* case to the Bihari refugees, it is clear that the Biharis succeed in qualifying on all counts for the links to Pakistani nationality.

The broad interpretation advanced at the Uppsala Colloquium suggested that the language 'his own country' was purposely chosen to avoid accepting formal governmental determinations of nationality as the final arbiter of whether there existed a right to return.⁸⁴ The decision of the International Court of Justice in *Nottebohm* further illustrated that a 'person's "country"' is that to which he is connected by a reasonable combination of . . . race, religion, ancestry, birth and prolonged domicile'.⁸⁵ Though right to return is limited to nationals, the *travaux préparatoires* appear to confirm that this distinction does not extend to aliens or stateless persons who have a strong attachment to a State that they view as their 'own country'.⁸⁶ It can be argued that article 12(4) ICCPR66 is applicable to refugees, since they would want to return as soon as conditions in the country of origin improved. This article also seeks to prevent individuals being denied their right to return to their country of origin.

The term 'own country' thus implies a bond between the claimant and the State, and is premised on the right to a nationality. As argued earlier, nationality does not rest exclusively within the reserved domain of domestic jurisdiction of States, but is based on the social fact of attachment. Since customary international law imposes certain duties on States, these principles have consequences for refugees. While '[t]he State of origin may choose to ignore the link of nationality and to "write off" those who have fled . . . this potentially involves a breach of obligation to the State of refuge, and . . . to the international community'.⁸⁷

4.2 Genuine effective link and admission

Although nationals of Pakistan, the Biharis are subject to the lack of the usual attributes of nationality, including effective protection. The absence

⁸³ *Nottebohm* case, ICJ Reports (1955).

⁸⁴ See Vasak, K. & Liskofsky, S., eds., *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–21 June 1972*, American Jewish Committee, New York (1976).

⁸⁵ Muzzawi, *Comment on the Middle East*, in Vasak & Liskofsky, *The Right to Leave and to Return*, above n.84, 343.

⁸⁶ See Bossuyt, above n.75, 261; Nowak, *UN Covenant*, above n.72, 219.

⁸⁷ Goodwin-Gill, G. S., 'Voluntary Repatriation — Legal and Policy Issues', in Loescher, G. and Monahan, L., *Refugees and International Relations*, OUP, Oxford (1989) 261.

of effective protection requires assessment of the genuine effective link.⁸⁸ The crucial question of link may determine effective nationality, and in that the Biharis have demonstrated the fact of attachment, complete with interests and sentiments. Pakistan, in fulfilling its responsibilities as a nation-State ought to recognize the norms of international law set out in the *Nottebohm* case by granting effective nationality and rights to the Bihari refugees.

Bihari refugees renounced their homes in 1947, in order to make East Pakistan their country of nationality and residence. Bangladesh was not the country to which they had freely migrated or chosen. Before the birth of Bangladesh, they stood for the integrity of Pakistan, were Pakistani nationals, and until today have not renounced their Pakistani nationality.⁸⁹ Immediately following Pakistan's defeat in 1971, with the threat of a Bengali backlash, the Biharis asked the Indian Army for asylum. This request was rejected by the Government of India.⁹⁰ Repatriation negotiations began with the ICRC census of Biharis in refugee camps.⁹¹ At the same time, Bangladesh Prime Minister Mujibur Rahman was interested in exchanging the Bengalis in Pakistan for the Biharis in Bangladesh. He solicited the services of the UN to arrange for the repatriation.⁹² However, the Pakistani repatriation formula was highly politicized and intended to leave out the bulk of the Bihari refugees.

Whereas Bangladesh was prepared to receive all the 128,000 Bengalis registered for repatriation, Pakistan agreed to the return of only 58,000 military personnel, former civil servants and members of divided families and 25,000 hardship cases, totalling 83,000. By the conclusion of the UNHCR repatriation operation in June 1974, 108,750 Bihari refugees had returned to their country of former habitual residence,⁹³ although the ICRC registered 539,639.⁹⁴ However, a revised account stated that 534,792 had applied for repatriation and 118,866 came within the

⁸⁸ In the *Nottebohm* case, the Court expressed its view that, on the basis of the practice of States, judicial decisions and the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with reciprocal rights and duties.

⁸⁹ In their opinion, the Bihari refugees' right of self-determination is evidenced in the fact that the basic principle of their being Pakistanis is not negotiable. This was reiterated in interviews conducted in 1996-97. The non-negotiability of their nationality is evidenced in their continuous state of refugeehood.

⁹⁰ Sunanda Datta-Ray stated that hundreds of Biharis had fled to Nepal, where they were visited by Tom Jamieson, the representative of UNHCR in India. See *The Observer*, 12 Mar. 1972.

⁹¹ Minority Rights Group, *The Biharis in Bangladesh*, Report 11, 4th ed., (Jan. 1982), 16.

⁹² *The Observer*, 12 Mar. 1972.

⁹³ Compiled from reliable press reports, Table 5 lists 160,000 Bihari refugees repatriated in 1973-74. However, the figure of 108,750 was mentioned in the MRG report. See Minority Rights Group, above n.91, 16-17.

⁹⁴ Proceeding Report, *International Conference to Consider the Plight of the Non-Bengalis in Bangladesh Who Opt to go to Pakistan*, International Council of Voluntary Agencies, Geneva (13-14 December 1982), 3-4.

designated categories. Having included the 41,860 returnees from other countries, a total of 163,072 Biharis returned,⁹⁵ although the majority, 371,720, still remained in the camps.

The first phase of repatriation was suspended in June 1974, with the exhaustion of funds at the disposal of the UNHCR. At this point, some 112,000 were repatriated, and in early 1976, Bangladesh requested that the repatriation process be resumed. In response to individual appeals by the two governments, Saudi Arabia offered a C-130 transport plane, and Qatar and Kuwait contributed \$500,000 and \$50,000 respectively. The UNHCR chartered nineteen flights and in August 1977, Pakistan agreed to take 25,000 refugees in the hardship category; however, these were the remaining refugees from 1974, and did not include any new hardship cases.⁹⁶

Only 9,872 were repatriated before funds ran out again in 1979. Since then, Bangladesh has raised the matter with Pakistan,⁹⁷ and as a result, and through a UNHCR initiative, 7,000 persons were cleared for repatriation.⁹⁸ However, by April 1982, Pakistan had only cleared a total of 4,800, comprising 750 families.⁹⁹ The cost of the repatriation was estimated at \$2 million, of which UNHCR contributed \$400,000 from funds collected in the past.¹⁰⁰

Although Pakistan's President Zia-ul Haq thought his country had fulfilled its obligations under the Tripartite Agreement of 1974, he appears genuinely to have desired a solution to the humanitarian problem of people who had suffered for no other reason than their loyalty to Pakistan.¹⁰¹ In fact, at no stage in senior government discussions was it claimed that Pakistan had fulfilled her obligations under the 1973 and 1974 agreements.¹⁰² As President Zia stated, the Government of Pakistan would accept Bihari refugees if sufficient financial resources were raised for their transfer and rehabilitation.¹⁰³

The high point of the proposed repatriation was the trust agreement, signed in August 1985, between Pakistan and *Rabita Al-Alam Al-Islami*,¹⁰⁴

⁹⁵ Minority Rights Group, above n.91, 30.

⁹⁶ Proceeding Report, *International Conference*, above n.94, Annexure IV.

⁹⁷ The issue was raised during the visit of Mr Riaz Piracha, Foreign Secretary of Pakistan, to Dhaka in 1980.

⁹⁸ By October 1981, Bangladesh had cleared 7,800 names (1,143 families) that had been incorporated in the 'Green Book', that is, the list cleared in 1974.

⁹⁹ The remaining were not cleared on grounds of impersonation and lack of supporting documents. See Proceeding Report, *International Conference*, above n.94, Annexure IV.

¹⁰⁰ Ibid.

¹⁰¹ Ennals, David, Proceeding Report, *International Conference*, above n.94, 2-4; Correspondence of Ennals to Niaz Niak, Foreign Secretary, Government of Pakistan, 11 Apr. 1983.

¹⁰² Ennals and Husain, *Stranded Pakistanis Resettlement Project*, Mission Report (15 Nov.-14 Dec. 1983), 5.

¹⁰³ Ibid.

¹⁰⁴ A charitable organization, translated as World Muslim Congress. Henceforth referred to as *Rabita*.

wherein Pakistan agreed to resettle the Bihari refugees on humanitarian grounds by providing land, water, sewage, power supply and sewage connections, provided that the entire cost of transport, construction of houses and resettlement, estimated at \$300 million, was borne by overseas funds.¹⁰⁵ A willingness to accept and resettle 250,000 refugees, enabling the closure of camps in Bangladesh, is an illustration of Pakistani practice to include all the refugees within the said categories as per the 1974 Agreement. The 'total commitment' for return of her nationals was cemented in a letter from President Zia¹⁰⁶ and the Government of Pakistan GOP.¹⁰⁷ Further, a Pakistani request for this proposed repatriation received a supportive response from the UNHCR.¹⁰⁸

The resettlement plans included the construction of 36,000 houses spread over 80 sites costing about \$278 million,¹⁰⁹ with approximately \$30 million for community services and \$10 million for transportation.¹¹⁰ While the Trust members were waiting for responses from Pakistan, the latter was waiting for a costed-timed project from the *Rabita*. Though \$250 million was available, the view was that Pakistan should share the remaining cost.¹¹¹ At this stage, UNHCR was unable to contribute financially to the process.¹¹²

Lending national significance to the issue, a private member's resolution adopted by Senate¹¹³ recommended to the GOP that the refugees be repatriated at an early date. As the blueprint for the repatriation was being drawn up, it was emphasized that the refugees would not be repatriated camp-to-camp, but rehabilitated. In this regard, the location for resettlement would be determined by the GOP.¹¹⁴

Despite all the provisions made for an orderly departure programme and the availability of funds, the GOP did not respond. This lack of

¹⁰⁵ See Trust Deed, Section B.

¹⁰⁶ See Ennals, David, Speech, 6th Annual Conference of SPGRC, Dhaka, 21 Apr. 1985. Further, President Zia set up a joint committee of four representatives of GOP and four appointed by *Rabita* to oversee the repatriation plans. See *Arabia* (Aug. 1985) 26.

¹⁰⁷ Pakistan Finance Minister, Mahbubul Haq stated to the Pakistan National Assembly in June 1985 that '... Pakistan was ready to receive the additional Biharis'. See *Arabia* (Aug. 1985) 24. It was reiterated by the Foreign Affairs Minister, Zian Noorani as well. *The Pakistan Times*, 9 Feb. 1986.

¹⁰⁸ Ibid.

¹⁰⁹ Correspondence of Georg Popper and NA Farooki (Austrian Building Consultants) to Prime Minister of Pakistan, NAF/kud 2114/85, 22 May 1985.

¹¹⁰ Correspondence of David Ennals to Mohammed Khan Junejo, Prime Minister of Pakistan, 26 Jul. 1985.

¹¹¹ Ennals, 'Reports of Meetings', Jeddah, 28–29 Jun. 1985. However, figures of \$200 million (*Dawn*, 3 Jan. 1986) and \$278 million (*The Bangladesh Times*, 29 Dec. 1985 and *Daily Jung*, 23 Jan. 1986) were reported to have been made available from generous donors or pledged by bank guarantees. Also see *Impact International*, 14–27 Aug. 1987.

¹¹² Poul Hartling, High Commissioner, UNHCR had stated that the demands on their services was enormous, and since he was not getting adequate funds for urgent work, he could not contemplate taking any new projects. Ibid., 6.

¹¹³ Upper House, Parliament of Pakistan.

¹¹⁴ *Daily Jung*, 23 Jan. 1986.

response inevitably 'cast doubts on the sincerity of statements by (both) President Zia' and the GOP.¹¹⁵ While *Rabita* wanted some positive indication from the Pakistan PM's office, Pakistan wanted the Trust to enter into an agreement with *Rabita* in order that negotiations with the GOP could continue with *Rabita*.¹¹⁶ It began to emerge that '*Rabita* [would] not be able to fulfil the commitment entered into with the President in March 1984, unless the funds raised through the International Resettlement Trust [were] made available and the Trust itself, [would be] unable to fulfil (its) commitment except with the co-operation of *Rabita* in the light of the *attitude* of the Government of Pakistan'.¹¹⁷

This non-policy response of the GOP needs to be politically assessed. There was no evidence that the government seriously considered the resolutions passed by the Senate, nor did it inform the latter of the reasons for the non-implementation of its resolutions.¹¹⁸ The details of the movement from Pakistani authorities remained unclear,¹¹⁹ but soon enough the GOP decided to deal with this matter *solely* through the *Rabita*. The lack of interest in the GOP was further illustrated by the fact that all international agencies willing to assist in the resettlement scheme were advised to establish contact directly with the *Rabita*,¹²⁰ and at a time when UNHCR was providing both financial and logistical support to 3 million Afghan refugees in Pakistan. The re-routing of all involvement with the international agencies for the repatriation clearly indicated the indifference of the GOP.

While the GOP always insisted on overseas funds for the repatriation process,¹²¹ in the absence of *Rabita* funds, the International Resettlement Trust had \$278 million made available over a three-year period. These funds were made known to *Rabita* and the GOP several times in 1985, but for reasons never explained, neither body was prepared to enter into negotiations and this large sum of money, enough to build the required 36,000 dwellings, was ignored.¹²²

¹¹⁵ Correspondence of Ennals to Nasim Khan, 17 Apr. 1986.

¹¹⁶ Minutes, Meeting of David Ennals with Ambassador of Pakistan in London, 1 May 1986.

¹¹⁷ Correspondence of David Ennals with Abdullah Omar Naseef (Secretary-General, *Rabita*), 18 Jun. 1986; emphasis supplied.

¹¹⁸ Although Agriculture Minister Sartaj Aziz assured the Senate for the rehabilitation of the Bihari refugees, GOP policy remained unclear even to Pakistani Parliament. *Dawn*, 14 Jul. 1988.

¹¹⁹ See Ennals, 'Statement', SPGRC, Dhaka, 27 Jul. 1986.

¹²⁰ A statement, 'Transfer of Non-Bengalis', was read by the Pakistani Ambassador in London to David Ennals, which was a reply to Ennals' letter of 27 Apr. 1987 to Prime Minister Mohammad Khan Junejo, 31 Jul. 1987.

¹²¹ This was reiterated by the Prime Minister Muhammad Khan Junejo who stated '... the only problem, which I feel, is to collect the funds and tell us (GOP) the funds are here. We would like to have small colonies ... hospitals, community centres, mosques ... be developed'. Interview of PM Junejo by Syed Hasan Mutahar, Editor, *The Muslim World League Journal*, reproduced in Conference Proceedings, International Council for Repatriation of Pakistanis from Bangladesh, New York, 2-3 April 1988; emphasis added.

¹²² See Statement by Lord Ennals, House of Lords, London, Sept. 1987.

However, some members of the GOP have accepted the right of return of Bihari refugees.¹²³ Other political members argued that having the Government of Bangladesh (GOB) ask the GOP to repatriate her nationals¹²⁴ is 'most humiliating, [and] ... considering we have played host to 3 million Afghan refugees, why is the Government dragging its feet and not committing itself to bringing these Pakistanis back to their country? There is no excuse for this inordinate delay as even funds are available to the tune of \$270 million ...'¹²⁵ Pakistan, having acknowledged its moral and legal responsibilities for the Biharis repatriation, has refused to do anything about it.¹²⁶

In defence of the Biharis' right of return, while the Pakistan Law Minister is reported to have stated, 'It is their legal right that Biharis be brought to Pakistan. To deny them would amount to negation of the ideology on which Pakistan was formed',¹²⁷ former Pakistan Prime Minister Benazir Bhutto has traditionally opposed the return of Biharis,¹²⁸ stating that 'the issue of stranded Biharis is a complicated one'.¹²⁹ It is believed that she suggested to GOB that the Bihari refugees be permanently resettled in Bangladesh, describing the Bihari issue as 'politically potent'.¹³⁰ Observers believe that she feared the Biharis, if repatriated, would end up in Karachi and other areas,¹³¹ exacerbating the ongoing conflict with the Sindhi community.¹³² However, the Bihari refugees themselves never

¹²³ Foreign Affairs Minister Zian Noorani stated, 'Stranded Pakistanis in Bangladesh are true Pakistanis and they have every right to come to Pakistan'. *The Pakistan Times*, 25 Apr. 1988.

¹²⁴ See *Dawn*, 25 Mar. 1988. Further, Senator Mahzar Ali had stated, '... the repatriation of these people (Biharis) is the duty of the government and people of Pakistan and this should have been settled a long time ago'. *Times of India*, 22 Aug. 1989.

¹²⁵ Zia Ispahani is quoted in *Star*, 28 Mar. 1988.

¹²⁶ Syed Akbar in *The Muslim*, 25 Apr. 1988.

¹²⁷ Statement of Mian Mahmood Ali Qusuri, March 1982. See Proceeding Report, *International Conference*, above n.94, Annexure VII.

¹²⁸ Seemingly, she was following the party politics (PPP) and state policy of her father, Zulfikar Bhutto. The latter had introduced the restrictive entry regulations for Bihari refugees in the early seventies. The 'present government' of Benazir Bhutto 'was absolutely ignorant about their (Biharis) coming to Pakistan'. *The Pakistan Times*, 5 Feb. 1989.

¹²⁹ The semantics are interesting; Bhutto refers to Bihari refugees as 'stranded Biharis', and not 'stranded Pakistanis', thereby completely eliminating the refugees' link of nationality. See *Far Eastern Economic Review*, 19 Oct. 1989.

¹³⁰ *Ibid.*

¹³¹ However, it has been argued, that the earlier Bihari refugees settled in Punjab had not migrated to the Sindh provinces. See *The News*, 7 Oct. 1991.

¹³² The history of non-assimilation of the *Muhajirs* and Sindhis have resulted in sectarian violence between the two communities since 1947. Sindhi political parties have always protested against the repatriation. *The Times of Karachi*, 11 Oct. 1992. In fact, certain Sindhi leaders have termed their community as 'true Pakistanis'. *Dawn*, 6 Dec. 1990. Viewed against this political background, Bhutto admitted in a press conference in Kuala Lumpur that it was difficult for Pakistan to take Biharis back, pointing to the ethnic opposition of the Sindhi community. See *Weekly Holiday*, May 1990. However, her party colleague Malik Qasim (PPP) attacked her policy, stating that if Biharis were allowed to live in Punjab, it would not hurt the PPP policy in using the Sindh card, 'because it suits the PPP to go on pleasing the extremist [g]roups in Sindh'. *The Star*, 29 Dec. 1990.

wished to settle in Sindh.¹³³ Playing her Sindh card, Bhutto indefinitely put off the repatriation,¹³⁴ thereby lending support to Sindhi factions.¹³⁵ On humanitarian and moral grounds, Bhutto had stated that if she held the PM's office, the grant of the right to be citizens of Pakistan to Bihari refugees would be among her first acts. Upon achieving office, she did not grant citizenship rights either to the refugees in Bangladesh or to the 100,000 Biharis who have returned to Pakistan illegally since 1977.¹³⁶ Her government tolerated the presence of the Biharis but did not grant them citizenship, thereby protracting their status as stateless refugees.

However, Bhutto's political opponent, Nawaz Sharif, traditionally supported a policy to accept the Bihari refugees,¹³⁷ and this issue was on his election manifesto.¹³⁸ He allayed the fears of the Sindhi community by a categorical assurance that the Bihari refugees would be rehabilitated and officially domiciled in Punjab with the issue of identity cards.¹³⁹ As an interim measure, a consignment of 111,000 stitched clothes were sent to Bangladesh.¹⁴⁰

On assuming office as Prime Minister, Sharif held talks with Ershad on the issue of repatriation.¹⁴¹ He maintained that work had begun and 'results would come out soon'.¹⁴² The GOP reconstituted the board members of the Trust, with Sharif as chairman,¹⁴³ and Punjab was ready to accommodate all the Bihari refugees,¹⁴⁴ with adequate employment opportunities.¹⁴⁵ Wyne undertook a pilot project and had 3,000 houses

¹³³ *The News*, 23 Aug. 1991.

¹³⁴ *Dawn*, 24 Dec. 1990.

¹³⁵ *The Nation*, 4 Jan. 1991.

¹³⁶ Mirza, Loraine in *Muslim*, 27 Apr. 1990. In fact, the co-ordinator of PPP Policy Planning Group, Syed Tariq Sohail stated that the repatriation was 'undeniable moral obligation', and present Bhutto policy 'is a deviation from the 1988 manifesto, which says in para 40.2 "All Pakistanis living abroad by choice or compulsion will be allowed or helped to come back to the country"'. *Daily News*, 29 Dec. 1990; emphasis provided.

¹³⁷ Nawaz Sharif was earlier the Chief Minister of Punjab and was Prime Minister until his overthrow in a military coup in 1999.

¹³⁸ The parties of Sharif (IJI) and Altaf Hussain (MQM) had agreed upon a political alliance in Sept. 1989 by which it stated that as soon as IJI came to power, passports would be issued to all stranded Pakistanis (ie Biharis) and their repatriation would be finalized at the earliest. *Dawn*, 17 Dec. 1990.

¹³⁹ *Daily News*, 16 Dec. 1990.

¹⁴⁰ In 1989, when Sharif was Punjab Chief Minister. *The Star*, 1 Jan. 1991.

¹⁴¹ *Dawn*, 26 Nov. 1990.

¹⁴² *Daily News*, 12 Dec. 1990.

¹⁴³ *The Muslim World*, vol. 29 no. 8, 24 Aug. 1991. The Trustees which could not meet during the regime of Bhutto (*Dawn*, 23 Aug. 1991), was reconstituted with three committees, (a) Committee for Preparation of Rehabilitation Plan, (b) Planning and Logistics Committee and (c) Fund Raising Committee. See correspondence of Khurshid Anwar (Pakistan High Commission, London) to David Ennals, No. Pol. 2(4)/80, 29 Apr. 1992. Sharif directed the Cabinet Division and Minister of State and Frontier Region to co-ordinate the early repatriation of Bihari refugees. *Dawn*, 22 Mar. 1992.

¹⁴⁴ Punjab Chief Minister, Ghulam Haider Wyne, was quoted to be 'fully prepared to welcome them'. *Daily News*, 12 May 1991.

¹⁴⁵ *The Star*, 25 May 1991.

built to accommodate the first batch, and the Islamic Development Bank promised to extend assistance for the health and educational needs of the returning refugees.¹⁴⁶ In this endeavour, the Pakistan High Commission completed the registration of more than 200,000 refugees and provided them with identity cards.¹⁴⁷ The Punjab government allocated 1,035 acres of land over 32 districts, for the construction of 45,000 houses,¹⁴⁸ and in order to block their movement into Sindh, the refugees were to be allotted non-transferable houses.¹⁴⁹ In addition to provincial initiatives, the GOP had decided to match all external contributions, and the Government of Saudi Arabia had agreed to provide air transport to all the refugees.¹⁵⁰

As a first step, 20,000 refugees comprising 3,000 families were to return.¹⁵¹ The GOP indicated that some logistical and practical problems had delayed the repatriation,¹⁵² but the arrival of 325 Bihari refugees began the repatriation process. After the first batch, however, the process halted. Efforts to expedite the repatriation were undertaken with reported measures of the proposed completion of the housing units at Mian Channu by July 1993.¹⁵³ But by April 1993, Sharif was removed from power and Bhutto was reinstated as Prime Minister.¹⁵⁴ Although her government decided to honour the previous government's commitment to repatriate,¹⁵⁵ the repatriation process suffered a complete setback.¹⁵⁶

The interests of political parties and negative press gained from inter-ethnic riots in Pakistan have effectively blocked the repatriation process in over two and a half decades. With every political upsurge and turmoil, there has been a perceptible change in State policy, leaving the Bihari refugees in an orbit of statelessness and uncertainty. When Sharif returned to power, he once again offered to settle the Biharis in Punjab;¹⁵⁷ he held talks with Bangladesh Prime Minister Hasina on the question of return,¹⁵⁸ but no GOP policy paper ever emerged.

¹⁴⁶ *Business Recorder*, 31 Dec. 1992.

¹⁴⁷ Though different from the those issued in Pakistan. *The News International*, 3 Jan. 1993.

¹⁴⁸ *The Leader*, 3 Jan. 1993.

¹⁴⁹ *The News International*, 3 Jan. 1993.

¹⁵⁰ Correspondence of Ennals to Sardaz Aziz, Finance Minister of Pakistan, 6 Jul. 1992.

¹⁵¹ *The News*, 8 Sept. 1992.

¹⁵² *The Morning Sun*, 31 Dec. 1992.

¹⁵³ Correspondence of Khalid Saleem (Additional Foreign Secretary, Pakistan) to Ennals, No. 1271-AS(AP)/93, 20 Apr. 1993.

¹⁵⁴ *The Morning Sun*, 21 Apr. 1993.

¹⁵⁵ The Foreign Minister of Pakistan had conveyed to his Bangladeshi counterpart at the SAARC Council Meeting on 5 Dec. 1993. See Ennals, 'Report', 23 Mar. 1994.

¹⁵⁶ *Daily Star*, 9 May 1993. The 'go-slow' attitude of GOP has since led it to refrain from defining a timetable for repatriation. *Dawn*, 20 Dec. 1994.

¹⁵⁷ *Dawn*, 1 Jan. 1991.

¹⁵⁸ *The Asian Age*, 17 Jan. 1998.

Table 4:
Estimated Figures of Repatriation, 1972–1999

<i>Year</i>	<i>Number of Biharis Repatriated</i>
1973–74	163,072
1979	9,872
1982	4,800
10 January 1993	325
Total	178,069

Sources: *The News*, 8 September 1992; *The Guardian*, 11 January 1993; MRG, op.cit., 30; Proceeding Report, *International Conference*, op.cit., Annexure IV

The repatriation figures over the last 28 years well illustrate the law of diminishing returns.¹⁵⁹ So far, an estimated 178,069 Bihari refugees have returned to their country of former habitual residence. The majority of Bihari refugees¹⁶⁰ are still waiting to return, but Pakistan has yet to assure the Bihari refugees and the international community of its plans for the resolution of this protracted crisis. In 1996, the Foreign Secretary was reported to have stated, '[b]oth Bangladesh and Pakistan have recognized this repatriation as a *humanitarian* issue and agreed to solve it expeditiously ... I don't want to set a time limit'.¹⁶¹ Yet by evading its obligations, Pakistan is violating international law, the norms of human dignity and acceptable international behaviour, despite its membership of the Executive Committee of the UNHCR.

The Government of Pakistan has granted 1.5 million Afghan refugees freedom of movement and enterprise. It claims the presence of the Afghan refugees has adversely affected its economy, because of limited resources in the social sector. 'It (has been) indeed a complex situation but Pakistan has been meeting its humanitarian obligations forced on her by circumstances not of its own creation'.¹⁶² However, where the Bihari refugees are concerned, the present *impasse* is Pakistan's 'own creation'. Its practice has contravened principles it has acknowledged

¹⁵⁹ This terminology is borrowed from international finance law, where returns on investments portray a continuously diminishing trend.

¹⁶⁰ See Table 6.

¹⁶¹ Najmuddin Sheikh, Foreign Secretary, GOP, emphasis supplied. See 'Refugees to Return', *The Asian Age*, London, 19 Aug. 1996.

¹⁶² This can be interpreted as an official Government of Pakistan statement, since D. J. Khan was Secretary, States and Frontier Regions Division, Islamic Republic of Pakistan. See Khan, Dil Jan, 'The Magnitude and Complexity of Contemporary Refugee Problems in Asian-African Region: Humanitarian and Legal Responses', in AALCC-UNHCR Workshop, *International Refugee and Humanitarian Law*, 24–26 Oct. 1991, New Delhi (1991) 70.

as applicable to the international community, and which have been specifically addressed within the Asian and African contexts; these include, *inter alia*, '(a) refugee shall have the right to return if he so chooses to the State of which he is a national or to the country of his nationality and in this event it shall be the duty of such State or Country to receive him'.¹⁶³ There are already precedents in Pakistani practice for the return of nationals,¹⁶⁴ so that allowing the Bihari refugees to return would only reaffirm its practice, and produce neither a precedent or a burden of any sort.¹⁶⁵

The 1972 Pakistani government of President Bhutto expressed concern at the plight of the Biharis.¹⁶⁶ However, the acceptance of a return procedure has demonstrated the systematic violation of the right to return of the Bihari refugees.¹⁶⁷ In effect, the repatriation process has been manipulated to interfere with the international legal right of Bihari refugees to return to Pakistan.¹⁶⁸

4.3 Integration in the country of asylum

To argue that Bangladesh is responsible under the 1951 Convention/1967 Protocol relating to the Status of Refugees does not stand. Although the Convention '... contains a laundry list of particular rights to which refugees are entitled',¹⁶⁹ as a matter of law it does

¹⁶³ Art IV, 'Principles Concerning Treatment of Refugees', Asian-African Legal Consultative Committee, 1966: UNHCR, *Collection of International Instruments Concerning Refugees*, 2nd ed., Geneva, 1990, 201.

¹⁶⁴ Pakistan had sent a high powered delegation to resolve the issue of Pakistanis stranded in Libya. Further, GOP had evacuated 42,000 Pakistanis during the Gulf War by chartering 42 planes and 2 ships. A similar British practice is evidenced in the case of Ugandan Asians, to whom the British government granted admission because of their British nationality.

¹⁶⁵ The Chairman of National Advisory Council of Pakistan, Khaja Muhammad Safdar stated, 'It is a heinous crime to oppose the repatriation of Biharis to Pakistan. 250,000 cannot be a burden on 90 million people of Pakistan'. See Proceeding Report, *International Conference*, above n.94, Annexure V. Further, and as an example, repatriated refugees have successfully transformed barren land to form the Orangi Township in Karachi, entirely on self help, and not even resorting to aid from the Karachi Development Authority. See *The News*, 7 Oct. 1991.

¹⁶⁶ *The Economist*, 13 May 1972.

¹⁶⁷ Official statements like '[i]t is, however, not justified to expect Pakistan to continue to receive refugees' are indicative of a practice of the denial of nationality to her citizens. See Acting Permanent Representative, Pakistan Permanent Mission, Geneva, Tariq Altaf's letter to Executive Director of ICVA, Anthony Kozlowski, No.H(26)/82, 9 Dec. 1982 in Proceeding Report, *International Conference*, above n.94, Annexure V.

¹⁶⁸ Bihari refugees claim that because of the actions of the Pakistan Army in 1971, they were persecuted and are being continuously victimized. They wonder as to why they '... cease to be citizens of Pakistan. What happened to our right to repatriation? What happened to our right to return to our homeland?' The obvious confusion in mixing issues of the legal right of Bihari refugees to return and the repatriation process is amply evident in Pakistani practice in the last 28 years. Author interviews, 1996–1997.

¹⁶⁹ Lillich, Richard, *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press, Manchester (1984) 65.

not require the State hosting the refugees to integrate them completely into the social, political, economic and legislative fabric. Bihari refugees feel that they are the forgotten factor from the events of 1971.¹⁷⁰ Although some have been assimilated, this has been primarily due to personal resolution, and not as a result of initiatives on the part of the GOB over the last 28 years.

Although the citizenship order provided for integration,¹⁷¹ continued persecution rendered it impossible.¹⁷² A more recent 'cessation' clause was included whereby, 'a person shall not qualify to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign State'.¹⁷³ Since Bihari refugees have retained their Pakistani nationality, they are thus 'foreigners' in Bangladesh. Moreover, the Bangladeshi political elite believe that in the context of 'psycho-political settlement', total repatriation to Pakistan is the solution to the problem.¹⁷⁴ The GOB hopes for the successful repatriation of the camp inmates,¹⁷⁵ and instances of the grant of citizenship by the courts are not conclusive evidence of the recognition of human rights,¹⁷⁶ but based on previous domicile.¹⁷⁷

Over the years, the physical security of Biharis has improved although their situation is still serious.¹⁷⁸ Generations live together without proper nutrition, education or training. Since medical facilities are poor, there is a high incidence of disease and illness. Housing comprises rows of dingy and dark huts wrapped in bedsheets, blankets and hessian cloth, measuring 8 feet by 6 feet. Each dwelling accommodates an entire extended family. Social lives are completely

¹⁷⁰ Resolution, SPGRC, 2 October 1990.

¹⁷¹ See art.2, Bangladesh Citizenship (Temporary Provisions) Order, 1972.

¹⁷² See sections 2.1.1 and 2.1.3.

¹⁷³ Art. 2B, Bangladesh Citizenship (Temporary Provisions) Amendment Ordinance 1978 (Ordinance No. VII of 1978).

¹⁷⁴ Bangladeshis consider the Biharis to '... remain among the people as some aggrieved social parasites (sic) vulnerable to any subversive activities against the solidarity, integrity, social, cultural and economic well-being of the nation'. See Khurshida Begum, *Weekly Holiday*, May 1990.

¹⁷⁵ The temporary haven and the future repatriation of Bihari refugees are initiatives emphasized by GOB. Interview with Farooq Sobhan, Foreign Secretary, GOB, Jan. 1996. More recently, see Bangladesh PM Hasina's comments in *The Asian Age*, 17 Jan. 1998.

¹⁷⁶ Judges have reinforced orthodox views, where 'nationality can neither be acquired nor retained except with will of the State'. See *Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan v. Amalendu Paul*, PLD 1960 Dacca 329.

¹⁷⁷ Judges came to the finding that 'respondent was domiciled in Bangladesh since 1951 and that he did nothing except filing an application for option to Pakistan but never left Bangladesh ... The Respondent is a citizen of Bangladesh', Appellate Division, unreported judgment by the Chief Justice of Bangladesh. See Malik, Shahdeen, *Overview*, in UNHCR, *Regional Consultation on Refugee and Migratory Movements in South Asia*, New Delhi, 14–15 Nov. 1996, 33; emphasis added.

¹⁷⁸ Comments of Mr Finucane (Concern). See Proceeding Report, *International Conference*, above n.94, 2.

ruined where couples, their parents and children, are huddled together. Toilets and baths are scarce and are located at the perimeters of the camps, and water sources sport long queues. The refugees complain of persistent mismanagement regarding the control and distribution of wheat, corrupt officials who, despite cases against them in the courts, are allowed to function as usual; the lack of hygienic conditions and the general inability of the Ministry of Relief and Rehabilitation to repair damaged camp dwellings.¹⁷⁹

Though Bangladesh is yet to ratify the 1951 Convention, it allows most Bihari refugees to earn their living as rickshaw drivers, street cleaners, porters and petty shopkeepers.¹⁸⁰ Since Bangladesh does not consider them citizens, all avenues in official and semi-official institutions, including schools are closed to them. There is no chance of getting back their shops, houses, factories and other properties taken over by the Bangladeshis. The Bangladesh government made some efforts at restitution, but quickly refrained once the political implications were clear.¹⁸¹

The GOB's attitude has been one of toleration, though governmental efforts on behalf of the Biharis have been minimal. It claims to spend \$4 million annually in providing assistance¹⁸² and food rations,¹⁸³ even though children born since the enumeration in 1974 do not receive any support because they are not listed.¹⁸⁴ Attacks on camps¹⁸⁵ and threats of evictions¹⁸⁶ persist, and the general population still views the refugees with suspicion.¹⁸⁷

¹⁷⁹ Minutes, Extra-Ordinary Meeting, SPGRC, Saidpur, 31 Jan. 1986, and reiterated by interviews/observations during 1996–98.

¹⁸⁰ On conducting interviews in the refugee camps, I was told that several Biharis had graduate or post-graduate qualifications. They had worked in banks, government or private sector companies. But due to the present situation, they were forced to work in jobs much below their social standing. In this regard, Bangladesh has made little effort in implementing provisions of art.19, i.e. the Liberal Professions clause. Moreover, most of the refugees are exploited and are paid much less than the acceptable salaries.

¹⁸¹ Author interviews, 1996–98.

¹⁸² Proceeding Report, *International Conference*, above n.94, Annexure IV.

¹⁸³ About 3 kgs. of wheat per person per month. See Imtiazuddin, M. and A. Husain, *An Eye-Witness Report on 'Stranded Pakistanis' in Bangladesh*, Committee for Stranded Pakistanis in Bangladesh, USA, 30 Mar. 1982.

¹⁸⁴ Salauddin, M., *Citizens of Utopia*, Impact International, 25 Jul.–7 Aug. 1980.

¹⁸⁵ *Arabia* (Aug. 1985) 23; Report, SPGRC, 12 Sept. 1993.

¹⁸⁶ See SPGRC/786/Rep/Eviction/CTG/88, 11 May 1988. GOB sent a one-man Enquiry Committee to investigate the police firing and eviction of Bihari refugees from their place of residence. See SPGRC/786/Rep/Meet/88, 29 Jul. 1988; *Minutes of Meeting*, International Alert's Working Party on Biharis, 20 Oct. 1988. However, demolition and eviction has continued. See correspondence of Nasim Khan (SPGRC) to David Ennals, 30 Oct. 1993; SPGRC/Press Conference/94, 11 Aug. 1994.

¹⁸⁷ This has been corroborated by interviews. See Resolution, SPGRC, 2 Oct. 1990.

Table 5:
Situation Report of Bihari Refugees in Bangladesh, 1982

<i>Districts of Bangladesh</i>	<i>Number of Camps</i>	<i>Number of Biharis</i>
Dhaka including Narayanganj	29	95,095
Chittagong	7	29,958
Khulna	6	36,462
Rangpur	18	19,128
Rajshahi	10	4,520
Bogra	4	3,412
Jessore	4	2,985
Pabna	1	16,208
Mymensingh	1	3,757
Jamalpur	1	455
Total	81	211,980

Source: *Stranded Pakistanis in Bangladesh*, Ministry of Relief and Rehabilitation, Government of Bangladesh (1982)

Although figures for 1972 estimate the number of Bihari refugees in camps at one million,¹⁸⁸ by 1982, the number had dwindled by four-fifths, according to Bangladesh government figures. If these are reliable, then Biharis have left the relative security, but extreme hardship, of essentially unaided camps. Some may have made their way to Pakistan,¹⁸⁹ travelling illegally through India, while a substantial number were likely forced to seek work in different regions of Bangladesh, where unassisted domicile is a difficult but necessary proposition.¹⁹⁰ According to Table 6, over 250,000 Bihari refugees remain in camps.

¹⁸⁸ See Table 3.

¹⁸⁹ Bihari refugee families are said to have paid huge bribes in order to obtain exit permits. See *The Times*, 18 May 1972. As an example, refugees who made their way through India, were detained by GOP at the Khokhrapar border. See *Dawn*, 24 Apr. 1988.

¹⁹⁰ This is further corroborated in the official Bangladesh position where a survey had indicated 413,525 Bihari refugees in Bangladesh, of which 211,000 were in camps, a number close to Table 4 estimation. See A. A. Khan, Proceeding Report, *International Conference*, above n.94, 4; *The Guardian*, 7 Jul. 1987.

Table 6:
Situation Estimates of Bihari Refugees in 1996–97

<i>Names/ Locations of Refugee Camps</i>	<i>Number of Families</i>	<i>Number of Refugees</i>
Mohammedpur & Dhaka City	4,863	33,174
Adamjee Nagar	1,071	7,216
Narayanganj	132	895
Mirpur Section X	1,206	8,739
Mirpur Section XI	3,578	24,695
Mirpur Section XII (Moorapara Camp)	550	3,712
Mirpur Section XII (Kurmitola Camp)	506	3,166
Mirpur Section XII (Block C & D)	720	5,126
Mymensingh	318	2,227
Rangpur	936	8,526
Saidpur	912	38,045
Dinajpur	256	1,916
Bogra	503	3,757
Ishurdi	1,157	7,591
Rajshahi	453	3,470
Khalispur	2,406	14,769
Khulna	602	3,966
Jessore	442	3,336
Chittagong (S B Nagar)	1,467	8,904
Chittagong (Hali Shahar)	706	4,494
Chittagong (Firoz Shah Colony)	375	2,395
Chittagong (Raufabad Colony)	380	2,403
Gilatala	326	1,934
Total	39,779	258,028

Source: *Survey Report of ICRC, SPGRC, Geneva Camp, Mohammedpur, Dhaka*

4.4 Role of the UNHCR

The role of the UNHCR derives from the Statute of the Office and the duties ascribed to the Office of the High Commissioner by the General Assembly.¹⁹¹ Since international protection is premised on durable solutions, the first of which is repatriation,¹⁹² the Biharis' right to return justifies the direct involvement of the UNHCR. Since any further integration of Bihari refugees in Bangladesh is an unacceptable

¹⁹¹ UNGA res. 408(V), 14 Dec. 1950.

¹⁹² UNHCR, *The State of the World's Refugees: 1993*, Penguin Books (1993) 141.

proposition, to both the refugees and their host State, the role of the UNHCR lies in the provision of protection through the facilitation and promotion of repatriation.¹⁹³

UNHCR is also the agency concerned with the reduction and elimination of statelessness, within the context of its protection role.¹⁹⁴ In fact, at the 1961 Conference on the Reduction of Statelessness, UNHCR stated that it had 'always been the endeavour of the Office of the UNHCR to assist refugees in acquiring a nationality, as one of the means of ceasing to be a refugee'.¹⁹⁵ Moreover, while neither the 1951 Convention nor the *travaux préparatoires* say much about the source of persecution feared by the refugee,¹⁹⁶ article 1C(5) and (6) establish an exception which can be interpreted to support the continuation of refugee status. In the sense of these provisions, the right to refugee status for Biharis is supported as a consequence of 'compelling reasons arising out of previous persecution',¹⁹⁷ and thus justifies the continuing application of UNHCR's protection mandate.

The nature and extent of UNHCR's institutional responsibilities are relative to their duty to provide international protection during voluntary return. Any assessment of changed circumstances 'involves subjective elements of appreciation, in a continuum where the fact of repatriation may be the sufficient *and* necessary condition, bringing the situation or status of refugee to an end . . . contributing to . . . stability and to national reconciliation'.¹⁹⁸

UNHCR extended its good offices for the implementation of an agreement in the mid-seventies,¹⁹⁹ and the High Commissioner continued thereafter to be willing to provide assistance at the request of the two governments.²⁰⁰ While UNHCR ought in principle to reclassify Biharis as refugees, rather than as those in a 'refugee-like situation',²⁰¹ the status of Biharis as *de facto* stateless refugees still merits the intervention of UNHCR. The legal position of the Bihari refugees brings them within

¹⁹³ See discussion in Goodwin-Gill, *Refugee*, 273.

¹⁹⁴ UNHCR was requested to continue to act as the art. 11 implementing agency of the 1961 Stateless Convention: UNGA res. 31/36, 30 Nov. 1976; Batchelor, Carol, 'Stateless Persons: Some Gaps in International Protection', 7 *IJRL* 241, 252, 256 (1995); Weis, P., UN doc A/CONF.9/SR.23, 11 Oct. 1961.

¹⁹⁵ UN doc. A/AC.96/INF.5, 26 Oct. 1961.

¹⁹⁶ Goodwin-Gill, *Refugee*, 71.

¹⁹⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para.

136.
¹⁹⁸ Goodwin-Gill, *Refugee*, 270–1.

¹⁹⁹ J. Cuénod (UNHCR), Proceeding Report, *International Conference*, above n.94, 3.

²⁰⁰ David Ennals, Proceeding Report, *International Conference*, above n.94, 3.

²⁰¹ Cuénod, above n. 201. The traditional 'difficulty' in classification, as stated by Hugh Hudson (UNHCR), can be argued to give way to new interpretations, since the Bihari refugees fall within the contemporary understanding of international protection. See Hudson in 'Report of Meeting', International Alert Committee on Biharis, 2 May 1990.

UNHCR's mandate, and that office needs to impress upon Pakistan the need to realize its responsibility to repatriate them.²⁰²

First, UNHCR needs to conduct a proper census of refugees, to be followed by the issue of Pakistani passports. This would enable the Pakistani authorities to have a precise idea of the resources required for the repatriation and rehabilitation.²⁰³ Although the appeal for funds is crucial, it is possible for UNHCR to raise funds for the repatriation programme, once a request from the GOP is received.²⁰⁴ More recently, UNHCR has accepted the need for a wider and pro-active role, and has acknowledged 'a vacuum in the region regarding the status of resident non-nationals. The tendency is to avoid taking responsibility for persons whose citizenship is unclear. In accordance with its mandate, UNHCR should continue to play a catalytic role in the region to promote measures to reduce statelessness.'²⁰⁵

4.5 Return *ex debito justitiae*

The right to return has an international dimension, where the State's obligation to admit its nationals is the correlative to the other States' right of expulsion. Moreover, as an incident of nationality, the State's obligation for the protection of its nationals abroad is matched by its duty to receive those nationals who are not allowed to remain in other States.²⁰⁶

The right to return of Bihari refugees needs assessment within the 'primary' rule of international law which forbids the abusive exercise of rights of control over the movement of people,²⁰⁷ rights which would be violated if certain limits are exceeded in the course of the exercise, or if they are exercised with the intention of harming others.²⁰⁸ The practice of Pakistan has harmed the Bihari community where the inability of refugees to return home has being accentuated by the arbitrary deprivation

²⁰² In this regard, it had been unnecessary for a non-political body like UNHCR to point out that 'Pakistan had already accepted over 2.5 million Afghan refugees and would find it difficult to provide resettlement assistance to the non-Bengalis (ie Biharis) from Bangladesh'. Statement of Mr Cuénod (UNHCR), Proceeding Report, *International Conference*, above n.94, 5.

²⁰³ The physical resources of the Bihari refugees can be effectively put into use. Although the priority might be the elderly and disabled, it might be useful to move young families first, so that they have established homes for the extended families. Further, services of refugees trained as administrators, teachers, community and building workers could be harnessed in resettlement activities.

²⁰⁴ UNHCR has been the principal focal point for UN operations and the expertise of the Office would be useful.

²⁰⁵ UNHCR, 'Strategy in Asia: Towards the New Millennium', Geneva, March 1999.

²⁰⁶ Goodwin-Gill, G. S., 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in Gowlland-Debbas, V., ed., *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, The Hague/Boston/London (1996), 100.

²⁰⁷ Ago, Roberto, 'Second Report on State Responsibility': UN doc. A/CN.4/233, in *YBILC II* (1970) 191-3.

²⁰⁸ Goodwin-Gill, above n.207, 99.

of their nationality.²⁰⁹ In this regard, a 'view is widely held ... that a State may not unilaterally shirk its duty of admission by depriving its national of his nationality ... [and] ... this duty remains in force, at least in so far as the individual concerned did not acquire another nationality'.²¹⁰ As Grahl-Madsen declared:

if a person has a nationality at the time when he becomes a refugee, he is to be considered a person having a nationality for the purpose of Article 1A(2). It follows that the country of which he was the national at the relevant date is the 'country of his nationality' in the sense of the said provision, and that it remains as such irrespective of whether he eventually loses his nationality ... irrespective of any subsequent factual residence.²¹¹

In summary, the right to return is guaranteed without restrictions to all nationals, including *de facto* stateless refugees.²¹² Since most Bihari refugees have not acquired another nationality, it may be concluded that Pakistan is depriving her *de jure* nationals their right to return in international law, a right which is regarded as *ex debito justitiae*.²¹³

²⁰⁹ See Report of the *Ad Hoc* Committee: UN doc. E/1618, 39.

²¹⁰ Van Panhuys, H. F., *The Role of Nationality in International Law* (1959) 57.

²¹¹ Grahl-Madsen, A., *The Status of Refugees in International Law*, vol. I (1966) 162.

²¹² Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel Publisher, Kehl/Strasbourg/Arlington (1993) 221.

²¹³ As a matter of right.

